NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

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REPORT OF THE GENERAL COUNSEL

This report covers selected cases of interest that were decided during the period from January 1, 1995 through September 30, 1995. It discusses cases which were decided upon a request for advice from a Regional Director or on appeal from a Regional Director's dismissal of unfair labor practice charges. It also summarizes cases in which I sought and obtained Board authorization to institute injunction proceedings under Section 10(j) of the Act.

Fred Feinstein
General Counsel

EMPLOYER DISCRIMINATION

Strike Protesting Employee Discharges Privileged Under No-Strike Clause

In our first reported case, we considered whether a strike in protest of the unlawful discharge of six employees was exempt from the reach of a contractual no-strike cause.

The Employer was engaged in construction work at three separate job sites. The employees were represented by Union A and covered by a collective bargaining agreement containing a no-strike clause which, inter alia, expressly prohibited sympathy strikes. Union B began a rival union campaign to organize the employees at two of the job sites and the Employer responded by discharging the six employees who had been involved in the organizing. Union B thereupon picketed at all three job sites with signs protesting such unlawful discharges. Employee C, who was a member of union B, refused to work behind the picket line and was discharged for striking in violation of the no-strike clause.

We decided to authorize complaint to place before the Board the question whether the discharge of the six employees constituted unfair labor practices of a character that would privilege employee C's honoring the picket line in the face of a valid no-strike prohibition.

In Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956), the Supreme Court held that a broad no-strike clause, without more, was not sufficient to waive the right to strike against those unfair labor practices which are "destructive of the foundation on which collective bargaining must rest." Id. at 281. In Arlan's Department Store of Michigan, Inc., 133 NLRB 802 (1961), the Board rejected a broad application of Mastro Plastics that would have excluded all unfair labor practice strikes from the operation of a general no-strike clause. Rather, the Board interpreted the Court's decision as immunizing only strikes that are in protest of "serious" unfair labor practices; i.e., those that contravened the policy of the Act which mandates that the "selection of the bargaining representative remain free." Arlan's, supra, at 804-805. Similarly, in Servair, Inc., 265 NLRB 181, 183 (1982), enfd. 726 F. 2d 1435 (9th Cir. 1984), the Board noted that a no-strike clause would not embrace strikes against unfair labor practices designed to interfere with employees' free choice of a bargaining representative. Such unfair labor practices, the Board noted, are destructive of the

"foundation of collective bargaining" referred to in Mastro Plastics; that foundation being "the employees' full freedom of association." See also, Vanguard Tours, 300 NLRB 250, 253-254 (1990), applying Mastro Plastics where the unfair labor practices were held calculated "to deprive employees of any meaningful representation."

The issue thus presented was whether the instant discharges were meant to deprive employees of their freedom of choice in supporting a particular union as their statutory bargaining representative. The discharges were not intended to deprive employees of their representation by the incumbent union but rather, they were aimed at dissuading the employees from displacing the incumbent with rival union B. However, employees have a statutory right to support rival unions, even though another union may be certified or recognized, as long as the employees do not otherwise run afoul of the Act. Thus, the discharges constituted interference with the employees' right of association and an attempt to deprive them of the opportunity to select rival union B as their bargaining representative at some future appropriate time. Indeed, the discharges effectively chilled the employees in the exercise of that right and permitted the incumbent Union to remain as the statutory representative irrespective of the employees' preference. In this respect, the instant case was similar in substance to cases such as Servair, supra, and Vanguard Tours, supra, where employers mounted campaigns of unlawful assistance to prevent particular unions from being chosen as the employees' bargaining representative.

In all the circumstances, therefore, we concluded that the discharges of the six Union B supporters constituted "serious" unfair labor practices within the meaning of Arlan's and Mastro Plastics. Inasmuch as the Arlan's rationale is applicable to sympathy strikers (Pilot Freight Carriers, Inc., 224 NLRB 341, 342 (1976)), employee C's sympathy strike in protest of such discharges was deemed exempt from the contractual ban on sympathy strikes.

Accordingly, we authorized issuance of complaint alleging the unlawful discharge of employee C.

EMPLOYER ASSISTANCE

Cadre of Ombudspersons As Statutory Labor Organization

Our next case considered whether the Employer violated Section 8(a)(2) and (1) by unlawfully establishing a company-wide cadre of five ombudspersons to informally resolve employee complaints, and modified its formal grievance system to offer the aid of employee "coaches" to help fellow employees to file and pursue job grievances.

For some time, the Employer had a formal employee grievance procedure. In early 1993 the Employer began a pilot program at one of facilities through which it offered an informal dispute resolution process to augment the formal grievance process. The informal process primarily centered on the appointment of an "ombudsperson," who would be "a neutral person available for informal, confidential discussion early in the dispute resolution process."

A pamphlet distributed by the Employer asked and answered the question "Who [sic] does the Ombudsperson represent?" as follows:

> The Ombudsperson doesn't truly "represent" anyone. Instead, he/she acts as a neutral party to hear any type of dispute from any employee at all levels of the company. Having heard your dispute, the Ombudsperson will then advise you about alternative courses of action. Your Ombudsperson will research information needed, advise and coach you, and interface with management to provide confidential feedback and recommend policy changes.

The pamphlet also stated: "The Ombudsperson is informed about employee rights and company policies and has influence in the company in order to create positive change within the managerial structure." It posed another question: "How can my Ombudsperson help me?" Its answer follows:

> The Ombudsperson can:
> - explain policies and procedures
> - advise you of alternative courses of action
> - help you to pursue a course of action
> - refer you to appropriate contacts
> - arrange contact meetings for you
> - mediate your dispute
> - follow up on conflict resolutions

- recommend changes to management
- collect, summarize and provide upward feedback to management while protecting confidentiality

In a later notice to all its employees, the Employer announced that it was expanding the ombudsperson program company-wide. The notice also stated: "Ombudspersons will serve as neutral members of the Company providing confidential and informal advice to all employees in resolving work-related disputes." The Employer classified and compensated the ombudsperson positions in a management-level category, and required the five ombudspersons to report to its Chief Executive Officer (CEO) "with an administrative reporting relationship to the V.P. of Human Resources." The ombudspersons functioned independently of the Grievance Administration Office (GAO), described below, which the Employer established at the same time. The ombudspersons did not take part in the formal grievance process.

In January 1995, the Employer stated that its CEO had selected individuals to fill the four new ombudsperson positions. Employee A, who filled the ombudsperson position in the facility in our case, was the former chairman of the employees committee (EC), which the Employer had disbanded in mid-1993. The other ombudspersons were mostly long-term employees, including a business manager, a senior engineer, a community relations administrator, and a senior scientist. The ombudspersons would be available to employees at all the Employer's domestic locations.

At the same time, the Employer established the GAO to receive grievances and to assign "coaches" to assist employees through the formal grievance process. The Employer named the former Marketing Director for Law Enforcement and Government to be the Manager of the GAO. The GAO established a roster of employees who served as coaches, whom the GAO assigned to employees on request.

There were about 70 coaches on the roster. When assigned to a case, the coaches discussed the issues with the employee, helped the employee draft the written grievance, reminded the employee of arguments, suggested alternate arguments, and attended any meeting or hearing with the employee. The coaches, who received training in grievance handling, did not speak on behalf of the employee at any step of the process. They did not take part in the informal dispute resolution process. The Employer continued their regular pay during the time that they served as coaches. They could only perform as coaches to the extent

that their regular work was current and they were otherwise available.

When this case arose, there were 11 grievances pending in the formal system and four others recently settled. They concerned disputes regarding termination, warnings, and job selections.

We decided to dismiss this charge on the view that (1) the cadre of ombudspersons did not involve employee participation; and (2) the coaches' involvement was confined to the formal grievance process, which the Grievance Administration Office administered, and so did not involve Section 8(a)(2) "dealing" as defined by the Board. We also decided that the GAO, which was run by a management official, did not violate Section 8(a)(2) because it merely tracked grievances as they proceeded up the process, which was lawfully constituted.

The Board and the courts have generally taken an expansive view of what constitutes a labor organization under Section 2(5). See NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959); Ona Corp., 285 NLRB 400 (1987); American Tara Corporation, 242 NLRB 1230, 1241 (1979); Ryder Distribution Resources, 311 NLRB 814 (1993). As the Board reiterated in Electromation, Inc., 309 NLRB at 994, accord, E.I. du Pont & Co., 311 NLRB 893, 894 (1993), three essential elements must be present:

> (1) that employees participate in the organization or committee; (2) that the organization or committee exists for the purpose, in whole or in part, of "dealing with" the employer; and (3) that these "dealings" concern such statutory subjects as grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The Act may require the existence of a fourth element, namely, a showing that the employees participating in the committee are acting in a representational capacity. Electromation, Inc., 309 NLRB at 994 n.20.

In Cabot Carbon, supra, the Supreme Court held that the term "dealing with" is not synonymous with the more limited term "bargaining with," but rather must be interpreted broadly. Under Board law, the "dealing with" requirement may be satisfied by consultations between an employer and a group of its employees that look toward the resolution of grievances or the improvement of terms and conditions of employment. Subsequently, the Board has held the following

to be labor organizations that "deal with" employers: an employee council that made proposals to management regarding employees' facilities and benefits, St. Vincent's Hospital, 244 NLRB 84, 86 (1979); an employee committee that made recommendations to the employer on working conditions and grievances, Predicasts, Inc., 270 NLRB 1117, 1122 (1984); and an employee action committee that made proposals to the employer regarding vacations and floating holiday schedules, Ona Corp., 285 NLRB at 405.

In E.I. du Pont, supra, both managers and employees served on the seven committees at issue, and each committee addressed different workplace issues. The Board found that each committee was "dealing with" the employer because each of them "involved group action and not individual communication" and "made proposals and management responded by word or deed." 311 NLRB at 894. It distinguished those facts from instances involving a "suggestion box" procedure, where "there is not dealing because the proposals are made individually and not as a group." Id.

Further, the Board has found groups of managers and employees not to be labor organizations where the groups performed the management function of grievance adjudication, Mercy-Memorial Hospital Corp., 231 NLRB 1108 (1977), John Ascuaga's Nugget, 230 NLRB 275 (1977), or where the groups together included the entire bargaining unit and performed managerial functions such as making job assignments, assigning job rotations and scheduling overtime. General Foods Corp., 231 NLRB 1232 (1977). Similarly, the Board adopted an ALJ's conclusion that an employees' communication committee was not a labor organization where all employees participated in committee meetings on a rotation basis and the committee served as a management tool to increase company efficiency. Sears Roebuck and Co., 274 NLRB 230, 244 (1985).

The Ombudspersons

In our case, we decided that the system of ombudspersons was not a Section 2(5) labor organization because it did not involve the participation of employees as required by the Electromation analysis.

"[P]ersons working in labor relations, personnel and employment departments...[are]...outside the scope of the Act." NLRB v. Bell Aerospace Co., 416 U.S. 267, 282-283 (1974) (quoting the legislative history of the Taft-Hartley Act). In our case, the Employer's ombudspersons reported only to the Chief Executive Officer, exercised significant

discretion in the performance of their jobs and gave input to the Employer regarding changes in the managerial structure, and were classified and paid at an executive level. The position therefore was in a class with labor relations, personnel or managerial employees who are not within the scope of the Act. The ombudspersons' function of collecting, summarizing and providing "upward feedback to management while protecting confidentiality" did not indicate otherwise. Thus, this function did not render those who performed it employees. The ombudspersons were merely acting as a "human" suggestion box or managerial employees who received the suggestions or feedback which they in turn collected and summarized and passed on to higher management. Similarly, the ombudspersons' function of recommending "changes to management" was performed as a member of management making recommendations to higher management. Since the system of ombudspersons therefore failed to satisfy the first Electromation criterion, we decided that it therefore was not a Section 2(5) labor organization.

We considered distinguishable NLRB v. General Precision, 381 F.2d 61 (3d Cir. 1967), cert. denied 389 U.S. 974, a case arising from an alleged violation of a Board consent decree. In that case, an employee grievant, at his/her option, could choose either a disinterested fellow employee or the employer-assigned Employee Counselor for representation beyond the first step of the grievance procedure. According to the employer's description of the plan, the counselors served as "direct lines to management, *representing* the employees in all matters of Company policy, information, and possible grievances." Id at 64 (emphasis added). The court rejected the employer's contention that its plan was lawful because its employee counselors were "management personnel." Instead, the court held that the plan was merely a successor to the "Hourly Employees Committee," which the employer, in a prior court decree, had been ordered "to cease its domination of and interference with..." Moreover, the court held, without elaboration, that, in the successor Counselor Plan, "the participation of employees is undeniable." Id.

In our case, the ombudsperson system did not give employees the choice of having a fellow statutory employee represent them. In addition, as shown above, the ombudspersons' responsibilities, reporting duties, and classification all supported the Employer's contention that the ombudspersons were not employees under the Act. Employee participation, therefore, was not involved in the

ombudsperson system. In addition, the Employer's pamphlet stated that the ombudsperson did not "represent anyone."

The Grievance Coaches

We decided that the system of providing the Employer-paid services of assistants or "coaches" to grievants, as part of the formal grievance procedure, did not constitute a Section 2(5) labor organization because it did not satisfy the second Electromation criterion, "dealing with" the Employer. In this system, either supervisory or nonsupervisory employees, including fellow employees of the grievants, may take part as coaches. Having satisfied the first element of the Electromation analysis, the system of coaches nevertheless did not "deal with" the Employer under the second criterion.

The formal grievance procedure was a strictly adjudicatory procedure and was itself lawful. Also, and very importantly, the formal dispute resolution process did not permit the coach to deal with managers on behalf of the grievant at any stage. As the grievance moved through the steps of the formal process, the coach may help the employee compose the grievance, may remind the employee of certain points to argue, and may suggest arguments to the employee. The grievant employee, however, must present his or her own case to managers. Finally, because the formal grievance panel performed a strictly adjudicatory function and did not "deal with" management, the role of employee coaches in the function of that panel did not raise Section 8(a)(2) concerns. Thus, neither the grievance panel itself nor the coaches made recommendations to management which it considers.

Accordingly, we decided that the Region should dismiss the charge.

EMPLOYER DISCRIMINATION

Requiring Employees to Execute Agreement Mandating Arbitration of Employment Claims

In one case, we concluded that an employer violated Section 8(a)(1) and (4) by requiring employees and applicants for employment to sign an agreement requiring employees to submit their employment claims to binding arbitration before seeking redress from any other forum concerning employment issues or termination and by terminating an employee who refused to sign such an agreement.

The provision in question stated that, by signing the agreement, employees agree that any employment dispute would be submitted to binding arbitration before a neutral third party, pursuant to the procedures of the American Arbitration Association. Claims or disputes concerning employment included claims involving contracts, torts, or violations of any statute. The provision also stated that employment was at-will.

The Employer admitted that the Charging Party was an otherwise satisfactory employee who was discharged solely because he refused to sign the agreement described above.

Initially, relying on National Licorice Co. v. NLRB, 309 U.S. 350 (1940), we noted that an individual contract of employment, when used to frustrate the exercise of statutory rights, was either void or voidable. For this reason, the Board has regularly concluded that an employer violates the Act when it insists that an employee waive his statutory right to file Board charges or to invoke a contractual grievance-arbitration procedure. See, e.g., Kolman/Athey Division of Athey Products Corporation, 303 NLRB 92 (1991); Kinder-Care Learning Centers, 299 NLRB 1171 (1990); Great Lakes Chemical Corp., 298 NLRB 615, 622 (1990). A union violates Section 8(b)(1)(A) when it conditions use of a hiring hall on a similar employee waiver. See Construction and General Laborers, Local 304 (AGC of California), 265 NLRB 602 (1982).

We found that the arbitration agreement in this case has precisely the same unlawful effect as the waiver demands or agreements condemned by the Board in the cases noted above. We specifically found that the agreement requires an employee to subordinate his/her right to file charges with the Board to the Employer's unilaterally chosen arbitration process. We noted that only a Section 8(a)(1) violation was alleged and found in Kinder-Care, not an additional 8(a)(4) violation. However, the rule in Kinder-Care stated that employees had to bring their employment related disputes to the employer immediately and did not explicitly bar employees from asserting their statutory rights, even though the Board construed the rule as having such an effect. On the other hand, in Great Lakes Chemical Corp., where employees were required to sign statements waiving their rights to bring any legal action against the employer as a result of a layoff or termination, the Board found a Section 8(a)(4) violation, as well as a Section 8(a)(1) violation.

The Employer contended that the arbitration agreement was lawful under Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 1647 (1991). In that case, Gilmer, a 62-year-old stockbroker employed by a securities firm, had been required as a condition of registration as a securities representative with the New York Stock Exchange, to agree to arbitrate any dispute arising out of his employment or termination. After he was terminated, he filed an ADEA charge with the EEOC; the employer then sought to compel arbitration pursuant to the agreement. The Court held that the agreement was enforceable against Gilmer. Gilmer had argued that the Federal Arbitration Act, 9 U.S.C. Sec. 1, barred mandatory arbitration of "contracts of employment" because it stated that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Court held, at 1651-52 fn. 2, that it was "inappropriate" to discuss the scope of this exclusion because "the arbitration clause being enforced here is not contained in a contract of employment." Instead, the arbitration agreement was part of Gilmer's registration with the New York Stock Exchange, and there was no claim or evidence that Gilmer and his employer were parties to an employment agreement that contained a written arbitration clause. In addition, the Court noted, at 1653, that individual employees subject to such arbitration agreements could nonetheless file ADEA charges with the EEOC, as Gilmer had done. The Court further noted, ibid., that the EEOC had the authority to investigate age discrimination problems even in the absence of a charge alleging a violation.

We concluded that Gilmer was not applicable to the charge described above. We noted that the Court in Gilmer stated that arbitration agreements must be considered binding waivers of signers' rights "unless Congress evidenced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Id. at 1652. Section 10(a) of the NLRA gives the Board authority to prevent or remedy unfair labor practices, regardless of any other dispute resolution mechanism that may be available. Therefore, the Board's policy of deferring to contractually-negotiated grievance-arbitration between an employer and a union is an exercise of the Board's discretionary authority and the antithesis of the purpose of the Employer's attempt here to preclude the Board from exercising its jurisdiction.

We additionally noted that Gilmer involved the enforcement of an arbitration agreement that Gilmer had previously signed and did not reach the question presented by this case, that is, whether the signing of the

arbitration agreement was a lawful term and condition of employment. Thus, Gilmer did not overrule the Board's conclusion that such agreements are unlawful. Moreover, because the Board, unlike the EEOC, cannot initiate investigations without the filing of a charge, any attempt by an employer or a union to bar an employee from filing an unfair labor practice charge would foreclose the Board from exercising its statutory jurisdiction.

Next, we concluded that the Employer's arbitration plan was not an adequate substitute for the Board's processes. The Act permits an employee to claim that his termination violated his statutory rights. Because the arbitration agreement states that employees are "at will," just cause is not required for a termination, and the agreement is essentially illusory.

In response to the Employer's argument that that arbitration agreement does not refer to the Board and thus does not bar the processing of an unfair labor practice charge, we noted that the Board rejected a similar argument in Construction and General Laborers, Local 304, supra. The Board also construed the "parent communication rule" in Kinder-Care as also barring charge-filing, even though the rule did not "on its face" prohibit such actions. Id. at 1178.

As to the Employer's argument that the arbitration agreement merely requires an employee to use the Employer's procedure before filing charges with the Board, we concluded that such purported protection of the right to file charges was essentially meaningless given the six-month statute of limitations in the NLRA and time delays in getting cases decided by an arbitrator.

Finally, Gilmer relied on the plaintiff's education and extensive business experience as evidence that he was not likely to be a victim of inequality of bargaining power in dealing with his employer. However, the education or experience of an employee is irrelevant to Board proceedings, because Section 2(3) of the Act does not rely on such factors in defining employees protected by the Act.

Refusing to Hire Union Member Applicants Seeking Supervisory Positions

In another case, we considered whether an employer violated the Act by refusing to hire union-member applicants

for employment where the applicants were seeking supervisory positions.

We decided to argue that the Employer unlawfully refused to hire the applicants, even if they sought supervisory positions, unless it were shown that the Employer refused to hire them solely based upon their union membership or other Section 7 activity undertaken while employed as supervisors.

In Pacific American Shipowners Association, 98 NLRB 582 (1952), a Board majority (Chairman Herzog and Member Styles) held that unemployed applicants for supervisory positions are not "employees" within the meaning of Section 2(3) of the Act, and therefore are excluded from the Act's protections along with those who currently hold such positions. The majority continued, however, that current employees of a particular employer are protected when applying for a supervisory position with that employer and noted that "members of the working class in general who are *in fact* employees within the Act's meaning" are also protected against unlawful discrimination "by reason of [their] current employment." The Board majority in Pacific American thus confined the Act's protection to currently-employed "employee" applicants for supervisory positions, excluding unemployed applicants. Id., at 597-598 n. 25 (emphasis in original)

Recently, however, the Board itself brought this holding into question when it explicitly declined to apply Pacific American to applicants for a confidential secretary position, noting that "we find it unnecessary to pass on the continuing viability of Pacific American's majority holding that unemployed applicants for a supervisory position are not protected by the Act." See, e.g., E & L Transport Co., 315 NLRB No. 43, slip op. at 2 n. 11 (October 18, 1994).

We decided that, if it were determined that the positions in our case were supervisory within the meaning of Section 2(11) of the Act, we would argue that Pacific American was wrongly decided and should be overruled for the following reasons.

Initially, we noted that the holding of Pacific American is clearly inconsistent with the well-established doctrine that the Act's definition of "employee" should be understood "in the broad generic sense," Briggs Manufacturing Co., 75 NLRB at 570, n. 3. The majority in Pacific American thus inappropriately excluded unemployed

members of the working class from the Section 2(3) definition of "employee." Notably, protection of applicants for supervisory positions who would otherwise be protected as "employees" more closely comports with the established rules of statutory interpretation, which make it clear that exceptions to the coverage of the Act and like legislation are to be narrowly construed. See, e.g., 3A Sutherland, Statutory Construction §73.01 (4th ed. 1986).

Our position in this regard was consistent with established Board doctrine holding that a union's refusal to refer hiring hall applicants to supervisory positions may violate Section 8(b)(1)(A) of the Act, which likewise protects only "employees." See, e.g., Hames Construction, 207 NLRB 359 (1973). Powers Regulator Company, 225 NLRB 138, 145 (1976). See also Hames Construction, 207 NLRB at 359. Significantly, in determining in such cases that applicants for supervisory positions are "employees," the Board has noted that, in industries with intermittent work:

> individuals may be employed as rank-and-file workers on one job and as supervisors on the next, and accordingly, . . . discrimination in their application for supervisory positions violates Section 8(b)(1)(A) as coercing and restraining them when *employees* on some other [industry] project. Powers Regulator Company, 225 NLRB 138 (1976).

Similarly, in the instant case, even if the particular positions at issue were supervisory, the Employer's discrimination against the applicants for these positions may have interfered with, restrained, or coerced them in the exercise of their Section 7 rights, as well as discouraged their Union membership as employees on some other project.

The departure from established principles in the Pacific American line of cases is not explained and there is no reasoned distinction drawn between those applicants for supervisory positions that are given the Act's protections, and those who are not. These cases stand for the problematical proposition that protection is given to those who are on an employer's payroll on the particular day they are discriminated against; protection is inexplicably denied to those who are unemployed on the day in question, but who are nonetheless employees in the "broad generic sense." Such a line of demarcation for the Act's protection gives protection to an individual based solely on the happenstance vagaries of his or her employment situation on the particular date of an employer's discriminatory actions.

Finally, our conclusion that applicants for supervisory positions are protected "employees" under the Act, unless they are otherwise excluded from coverage, was consistent with the legislative history of the 1947 amendments which excluded "any individual employed as a supervisor" from the Section 2(3) definition of the term "employee." In fact, the bill's supporters repeatedly assured their legislative colleagues that "only bona fide supervisors" would be excluded from coverage. The only other relevant reference in the legislative history is one statement of Senator Flanders that employers should have the power to "hire and discharge, promote, demote and transfer" its supervisors. Such authority is not inconsistent with protecting applicants for supervisory positions from discriminatorily-motivated actions, as Section 7 is premised on the principle that an employer may refuse to hire or may discharge for any reason or no reason, provided that its real reason is not that of encouraging or discouraging membership in a labor organization. Thus, providing the Act's protections to applicants for supervisory positions does not unduly limit an employer's power to hire whom it chooses to be supervisors.

EMPLOYER REFUSAL TO BARGAIN

Duty to Supply Information for Grievance Processing

In our next reported case, we considered whether an employer was obligated to provide information relevant to the processing of a grievance where the contract contained a grievance procedure but did not provide for arbitration.

The contract between the parties simply provided that "All grievances or questions in dispute shall be adjusted by the duly authorized representative of each of the parties to this agreement." A labor-management committee was established to resolve grievances, but there was no mention of arbitration in the agreement. In the subject case, an employee filed a grievance protesting his discipline for alleged poor workmanship on certain equipment. The Union requested the Employer to supply it with information relating to the equipment and the customer complaints leading up to the disciplinary action. The Employer refused to supply the information and the instant charge resulted.

We concluded that the Employer was obligated to furnish the Union with the requested information in order to assist the Union in its processing of the grievance despite the absence of a contractual duty to arbitrate the grievance.

In NLRB v. Acme Industrial Co., 385 U.S. 432 (1967), the Supreme Court stated: "There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." In determining whether information is relevant and therefore must be supplied, the principal requirement is that the requested information "would be of use to the union in carrying out its statutory duties and responsibilities." Id. at 437. The Court further pronounced that a union should not be forced to process a grievance "without an opportunity to evaluate the merits of its claim." Id. at 438. In the same vein, the Board has stated that a union "has a statutory right to potentially relevant information necessary to allow it to decide if the underlying grievances have merit and whether they should be pursued at all." Safeway Stores, Inc., 236 NLRB 1126, fn. 1 (1978).

Also pertinent to the present inquiry, the Board in United Technologies Corp., 274 NLRB 504 506 (1985), noted:

> Requiring information to be supplied when the employer contends the underlying grievance is not arbitrable does not place the employer at a disadvantage. The employer need not recede from its contract interpretation nor is it bound to any particular construction of the contractual provisions at issue when it must furnish the requested information for a grievance which may not be arbitrable.

Board cases also recognize the desirability of encouraging "resolution of disputes short of arbitration." E.g., Pfizer Inc., 268 NLRB 916, 918 (1984), quoting Acme Industrial, supra, at 432.

Our view that an employer must supply relevant information for the processing of grievances even absent an obligation to arbitrate was deemed consistent with the above principles. While we were aware that Calmat Co., 283 NLRB 1103 (1987), has been cited for the contrary position (Mobil Oil Corp., 303 NLRB 780, at 785 (1991)), that case was not considered applicable here. In Calmat, the administrative law judge rejected the union's contention that the requested information was relevant and necessary to the processing of the grievance, and went on to state (at p. 1105): "For

purposes of analysis, I treat this case as if the Union needs the information to determine whether to process the grievance to arbitration." However, the parties' contract had expired long before the grievance arose and the judge concluded that, in the absence of a contract, the employer was under no duty to arbitrate the grievance and thus, under no duty to furnish the requested information.

Calmat therefore did not address a situation where, as here, the parties have a current collective bargaining agreement containing an established mechanism for the resolution of disputes but no provision for arbitration. Thus, to apply Calmat here would mean the adoption of an approach which would compel the Union to pursue grievances without the opportunity to intelligently evaluate their merits or to sift out possibly nonmeritorious ones, and thus severely compromise the Union's ability to properly perform its representational duties. Settlement of disputes short of arbitration is to be encouraged. Where, as here, certain subjects are contractually grievable but the parties have mutually agreed in their contract to forego arbitration, the Union should not be deprived of the opportunity to intelligently evaluate the merits of particular grievances because of the unavailability of relevant information.

In these circumstances, we concluded that the instant Employer's refusal to honor the Union's request for information relevant to the processing of the employee's grievance was violative of Section 8(a)(5) of the Act.

Withdrawal of Recognition From Union Representing Both Guards and Non-Guards

In another interesting case, we considered whether an employer was privileged to withdraw voluntary recognition of a union because of its status as a mixed guard union representing a unit of guards.

The Employer provided security guards for a large utility company. In 1991 the Union, which admits both guards and non-guards to membership (i.e., a "mixed guard" union), successfully organized the guards and was voluntarily recognized by the Employer. The parties thereafter entered into a collective bargaining agreement with an expiration date in August 1994. Upon expiration of the agreement the Employer withdrew recognition of the Union in accordance with the Board's decision in Wells Fargo Corp., 270 NLRB 787 (1984), enfd. 755 F. 2d 5 (2nd. Cir.

1985). The instant charge contested the validity of that withdrawal.

We decided that the dissenting opinion in Wells Fargo as well as modern business practices concerning the utilization of industrial guards warranted issuance of complaint to enable the current Board to revisit the decision in Wells Fargo.

Section 9(b)(3) of the Act, enacted in 1947, states that the Board shall not decide that any unit is appropriate for purposes of collective bargaining:

> if such unit includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises, but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Thus, a unit will not be deemed appropriate if it contains both guards and non-guards, and no union will be certified to represent an appropriate unit of guards if it is, or is affiliated with, a mixed guard union.

In Wells Fargo, the Board held that an employer was privileged to withdraw voluntary recognition of a mixed union representing a unit of guards upon expiration of a contract. The Board noted that the initial voluntary recognition was lawful since, while the Board is prohibited from certifying a mixed union as representative of guards, the employer is free to accord voluntary recognition. The Board reasoned, however, that to require the employer to continue that relationship "gives the union indirectly-by a bargaining order-what it could not obtain directly-by certification-i.e., it compels the Respondent to bargain with the Union." Id. at 787. The Board noted that Congress' purpose in enacting Section 9(b)(3) was to shield employers of guards from the potential conflict of loyalties arising from a guard union's representation of non-guard employees or its affiliation with other unions who represent non-guard employees, and that the potential conflict would exist whether the mixed union is certified or not. Viewed in this light, the Board saw no distinction between initial certification and the compulsory maintenance of a bargaining relationship through issuance of a bargaining order. In

either case, the Board concluded, to saddle the employer with an obligation to bargain would present it with the same potential conflict of loyalties Section 9(b)(3) was designed to avoid.

Member Zimmerman, in dissent, maintained that issuance of a bargaining order would not improperly create a bargaining relationship because the employer had itself done that by voluntarily recognizing the union. He noted that while Section 9(b)(3) prohibits the Board from certifying a mixed guard union, nothing in that Section precludes the Board from issuing a bargaining order to an employer who had voluntarily recognized the mixed guard union. He noted that since Congress had written broader proscriptions in Sections 9(f), (g) and (h) disqualifying noncomplying unions from having representation petitions processed as well as specifically providing that their charges could not result in issuance of complaints, Congress knew how to prohibit bargaining orders in behalf of mixed guard unions if it chose to do so. Member Zimmerman therefore concluded that Section 9(b)(3) should be narrowly construed to enforce bargaining rights against employers voluntarily entering bargaining relationships.

In deciding to issue complaint we relied primarily on the arguments set forth in Member Zimmerman's dissenting opinion in Wells Fargo. We were also persuaded by the distinguishing language of Section 9(b)(3) itself, which forecloses the Board from finding a unit composed of guards and non-guards appropriate (an appropriate unit being a necessary predicate for issuance of a certification as well as a Section 8(a)(5) determination), but in the case of a mixed union, merely prohibits the Board from issuing a certification. Finally, we noted that the structure of the security industry had changed dramatically in recent years. Although in 1947 guards were normally employed by the same employers whose property they protected, today most guards are employed by independent guard companies that sell their services to other employers. Thus, a mixed union is less likely to represent both guards and the employees of the employer whose property the guards are protecting. Thus, the general concerns about the loyalty of mixed guard unions that underlay Section 9(b)(3) appear to be much less viable in the current industry structure.

Affirmative Bargaining Order as a Remedy For Unlawful Withdrawal of Recognition

On January 13, 1995, the Board advised the parties that it had decided to accept the remand from the Court of Appeals of Caterair International, 309 NLRB 869 (1992), 22 F.3d 1114 (D.C. Cir. 1994), employer's petition for cert. denied, No. 94-400 (Nov. 28, 1994), and that all parties could file statements of position with respect to the issues raised by the remand.

In Caterair, the Union had been certified in a three-location unit of employees after winning a December 1988 election by a 257-232 margin. The parties negotiated a two-year union-security contract effective in June 1989. In October 1989, the Union prevailed by a 252-205 margin in a deauthorization election. The Employer took over the three location unit in December 1989, recognized the Union, and adopted the 1989-1991 contract.

A year later, during the last six months of the contract, three employees asked the Employer how the Union could be decertified. The Employer provided documents explaining the Board's decertification election procedures. One document stated that if 50 percent of the employees advised the Employer that they no longer wanted union representation, the Employer could lawfully refuse to bargain "and possibly make wage and benefit changes after the contract expires."

In February 1991, various employees began circulating decertification petitions among the 750 employees. Employer supervisors and managers joined in the solicitation of petition signatures. In early March, a decertification petition containing 428 signatures was filed with the Board. On March 15, the Employer declined to bargain for a new contract relying on the petition it had assisted in soliciting.

In April, the Employer threatened to discharge a union activist who was "agitating" employees to strike in protest of the Employer's refusal to bargain. In May, 324 employees went to the union hall and 318 cast written ballots in favor of a strike after the contract expired on May 31. Although Employer officials told various individuals that strikers would be fired, some 289 employees ultimately went on strike in June. Among the strikers were 61 employees who earlier had signed the decertification petition.

Soon after the strike began, the Employer began hiring permanent replacements. In August, the Employer granted the employees a wage increase of 4 to 6 percent. On October 3, the Union made an unconditional offer to have the strikers return to work. The Employer rejected the Union's contention that the strike was an unfair labor practice strike and refused to displace any replacement employee.

The Board found, in agreement with the judge, that the Employer violated Section 8(a)(1) by circulating the decertification petition among the employees, by promising benefits if the employees signed the petition, and by threatening employees with discharge if they went on strike. The Board also found that the strike was an unfair labor practice strike and that the Employer violated Section 8(a)(3) by refusing to reinstate the strikers. Finally, the Board found that the Employer violated Section 8(a)(5) by withdrawing recognition from the Union based on a decertification petition that had been tainted by the Employer's unlawful conduct. To remedy the refusal to bargain violation, the Board issued both a cease and desist order and also an affirmative bargaining order.

The Court of Appeals affirmed all the Board's substantive conclusions. The Court then enforced the Board's remedial order except for the affirmative bargaining order. The Court reasoned that the affirmative bargaining order, unlike the cease and desist order, precluded the employees from decertifying their representative until the employer had bargained with it for "a reasonable period." Relying on People's Gas Sys., Inc. v. NLRB, 629 F.2d 35 (D.C. Cir. 1980) ("Peoples Gas"), the Court found that the Board had not adequately explained why the employer was required to bargain for a reasonable period as a precondition to processing any decertification petition.

The Court reasoned that the Board has discretion to grant or withhold an affirmative bargaining order as circumstances warrant. Because, in the Court's view, a decertification bar is an "extreme remedy," the Court required the Board to demonstrate that it has considered the propriety of such a remedy in the case before it. The Court recognized that the Union here was an incumbent entitled to a presumption of majority status and that Gissel was not controlling. But the Court reasoned that in the incumbent union situation, unlike a Gissel case (where the options are either to direct an election or issue a bargaining order with a decertification bar), the Board has a third remedial option to consider, namely, "mandating return to the status

quo, under which the employer refuses to bargain only at the peril of inviting an unfair labor practice charge."

For the reasons stated, the Court perceived that the order to the Employer to cease and desist refusing to bargain was "a more than satisfactory remedy in this case" and it therefore remanded for the Board "affirmatively [to] demonstrate its consideration of the competing values at stake before imposing the additional sanction of a bargaining order." Id. The Court noted that its remand in this case marks the sixth time in the past 14 years that it has "remanded such orders to the Board with a request for explanation as to why, in the particular circumstances, the extra protection against decertification was necessary." Id.

In response to the Board's invitation to the parties to file statements of position, we submitted the following arguments.

I. An Employer's Unlawful Withdrawal Of Recognition From The Exclusive, Designated Bargaining Representative Is Appropriately Remedied By Requiring The Employer To Bargain For A Reasonable Period With That Representative

In Peoples Gas, the Court stated, that in order to enforce a bargaining order that would have the effect of precluding employees from rejecting union representation for a reasonable period, it

> must be able to determine from the Board's opinion (1) that it gave due consideration to the employees' Section 7 rights . . . (2) why it concluded that other purposes must override the rights of the employees to choose their bargaining representatives and (3) why other remedies, less destructive to employees' rights, are not adequate.

We noted that an affirmative bargaining order is the Board's "traditional appropriate remedy for restoration of the status quo after the unlawful refusal of an employer to recognize and bargain with an incumbent union which was the majority representative within the meaning of Section 9(a)." Williams Enterprises, Inc., 312 NLRB 937, 940 (1993), issued on remand from, 956 F.2d 1226 (D.C. Cir. 1992). We argued that the Board's traditional remedial policy vindicates the Section 7 rights of employees to have representatives of their own choosing and does not restrict the rights of the employees opposed to unionization more than necessary in

order to restore conditions in which effective bargaining might again be possible and to afford the parties a fair chance to conclude a contract.

In P. Lorillard Co., 16 NLRB 684, 699-700 (1939), modified in relevant part, 117 F.2d 921, 924-926 (6th Cir. 1941), summarily reversed, 314 U.S. 512 (1942), the employer, who had voluntarily recognized a union but thereafter stymied bargaining, sought to avoid a remedial bargaining order on the grounds that, after a strike, a majority of the employees had abandoned the union and formed their own association. As here, the employer argued that an immediate election was the appropriate remedy. The Board rejected the employer's argument and issued what, even at that early date, was the traditional cease and desist and affirmative bargaining order also issued in this case.

In requiring bargaining even in the face of evidence that a majority of the employees now preferred a different union, the Board invoked the twin policy justifications that it had set forth in Inland Steel Co., 9 NLRB 783, 814-816 (1938), remanded on other grounds, 109 F.2d 9 (7th Cir. 1940), policy justifications that the Board still adheres to: First, that an employer's wrongful refusal to bargain, together with the delays incident to the litigation occasioned by that wrong, has a discouraging effect on the employees' union activity and predictably erodes the employee majority that designated the union as exclusive representative. Second, that the injury to the employees' organizational rights must first be remedied "by an order to bargain based on the majority obtaining on the date of the refusal to bargain." Otherwise, evasion of the duty to bargain would be encouraged, since the wrongdoer would profit "from the discouraging effects of its already accomplished violation of that very obligation." Id.

The Supreme Court approved this Board remedial policy in Lorillard, 314 U.S. at 512, and reaffirmed that approval two years later in Franks Bros. v. NLRB, 321 U.S. 702, 705-706 (1944), affirming 44 NLRB 898, 917 n. 24 (1942). Franks Bros. held that the balancing of the conflicting interests reflected in the Board's policy "does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement." 321 U.S. at 705. For the Board's remedial order only requires bargaining for a reasonable period and after the prior violation is fully remedied, the employees are free to reject the union if they so desire. Id. at 706.

The balancing of interests that the Supreme Court approved in Lorillard and Franks Bros. underlies the Board's policy, which was considered "well settled" more than 40 years ago:

> that after the Board finds that an employer has failed in his statutory duty to bargain with a union, and orders the employer to bargain, such an order must be carried out for a reasonable time thereafter without regard to whether or not there are fluctuations in the majority status of the union during that period. [Footnote omitted] Such a rule has been considered necessary to give the order to bargain its fullest effect, i.e., to give the parties to the controversy a reasonable time in which to conclude a contract.

Poole Foundry & Machine Co., 95 NLRB 34, 36 (1951), enforced, 192 F.2d 740, 742 (4th Cir. 1951), cert. denied, 342 U.S. 954 (1952)("Poole"). That policy is the foundation for the rule that the obligation to bargain undertaken in settlement of refusal to bargain charges must likewise be complied with for a reasonable period. Poole, 95 NLRB at 36-37. Accord NLRB v. Stant Lithograph, Inc., 297 F.2d 782 (D.C. Cir. 1961).

We noted that, in the view of the Court of Appeals, the Board's remedial policy "gives too much weight to the interests of the Union, too little to the statutory rights of employees, and rests too much on speculation." Peoples Gas, 629 F.2d at 48. We argued that the Court's view also minimized the seriousness of a withdrawal of recognition from an incumbent union on the employees' freedom of choice, and that the Board should maintain a different view.

It is inherently plausible that "[w]hen a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it." Local 357 Teamsters v. NLRB, 365 U.S. 667, 675 (1961). Conversely, as the Board stated in Lancaster Foundry, Corp., 82 NLRB 1255, 1256 (1949),

> When an employer refuses to bargain with a union, especially when the refusal is protracted, employee support usually withers and dies. Old employees lose interest and resign; new employees refuse to join.

For that reason, as the Board explained in Karp Metal Products Co., 51 NLRB 621, 624-627 (1943), enf'd w/o op. Oct. 23, 1943, cert. denied, 322 U.S. 728 (1944)("Karp"), a refusal to recognize and bargain is a serious interference with the right of employees to have representatives of their own choosing:

> Employees join unions in order to secure collective bargaining. Whether or not the employer bargains with a union is normally decisive of its ability to secure and retain its members. Consequently, the result of an unremedied refusal to bargain with a union, *standing alone*, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether.

51 NLRB at 624 (italics added)(footnote omitted). Moreover, the Board's assessment of the serious harm to employee rights from unlawful refusals to bargain was endorsed by the Supreme Court in Franks Bros. Co. v. NLRB, 321 U.S. 702, 704 (1944).

We noted that the Court of Appeals acknowledged that a decertification bar remedy may be necessary to insulate "a fragile union against the lingering effects of massive employer coercion." We argued, however, that the Court failed to understand the need to afford that same remedy to a relatively mature incumbent union that, like the Union here, did not enjoy an insulated period at the time of the unfair labor practice. Indeed, the Board has long been of the view that the situation of an incumbent union restored to its lawful place as the result of a bargaining order--the situation in Poole, 95 NLRB at 36--is analogous to the situation of a union recently certified in a Board election, or one voluntarily recognized by the employer. Keller Plastics Eastern, Inc., 157 NLRB 583, 586-587 (1966). The Board has considered that in all three situations:

> negotiations can succeed . . . , and the policies of the Act can thereby be effectuated, only if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time.

Keller Plastics Eastern, 157 NLRB at 587.

Although the Board has not spelled out its reasons for thinking the three situations analogous, we argued that those reasons should be apparent. Franks Brothers teaches that "bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," 321 U.S. at 705. Thus, a union that is restored as the employees' bargaining representative after years of litigation needs time to re-establish itself, to re-organize its supporters, and to attempt to negotiate a contract. As the Board observed in the context of its certification year rules, after a bargaining hiatus of several years, some time must be allowed simply for the ousted representative to re-establish ties with the employees. See Dominguez Valley Hospital, 287 NLRB 149, 150 (1987), enf'd 907 F.2d 905 (9th Cir. 1990); Van Dorn Plastic Machinery Co., 300 NLRB 278, 278-279 (1990), enf'd 939 F.2d 402, 405 (6th Cir. 1991). Also, "it is unreasonable to conclude that these parties could resume negotiations at the point where they left off over 2 years ago or that fruitful negotiations could take place during a mere 2 months of bargaining after such a hiatus." Colfor, Inc., 282 NLRB 1173, 1175 (1987), enf'd 838 F.2d 164, 167-168 (6th Cir. 1988).

The limited remedy proposed by the Court--namely, a cease and desist order that is instantly terminable by either disaffected employees or the employer acting on their behalf--does not afford the wronged union adequate time to regroup and to negotiate a contract. For that reason, the Court's limited remedy is not different in practical effect from the conditional bargaining order entered by the Sixth Circuit in Lorillard, supra, 117 F.2d at 924-926, and summarily set aside by the Supreme Court, 314 U.S. at 512. Both orders permit the wrongdoer to profit from the discouraging effects of its own unlawful refusal to bargain.

The Court's perception that an affirmative bargaining order is an "extreme remedy" stems from its belief that a decertification bar's restriction of the right of current employees to oust the union violates the principle that "effectuating ascertainable employee free choice [is] as important a goal as deterring employer misbehavior," quoting NLRB v. Gissel Packing Co., 395 U.S. 575, 614 (1969). However, in Gissel, a unanimous Supreme Court rejected the argument that a bargaining order is "an unnecessarily harsh remedy that needlessly prejudices employees' Section 7 rights solely for the purpose of punishing or restraining an employer." Gissel, 395 U.S. at 612-613.

Moreover, even accepting that a Gissel bargaining order requires special justification, we argued that it does not follow that an affirmative bargaining order to remedy a refusal to bargain with an incumbent union is an extreme remedy that requires special justification. As Judge Silberman correctly observed in dissent in Sullivan Industries v. NLRB, supra, 957 F.2d at 910 (1992), "The classic remedy for a refusal to bargain [] is a bargaining order; there is thus no apparent reason to force the Board to further explain its choice" (emphasis in original).

Finally, we argued that an affirmative bargaining order is appropriate in this case.

Prior to the unfair labor practices in this case, a majority of employees had recently shown their support for collective bargaining, both in a certification election, and in a deauthorization election. In the face of unlawful employer promises of benefit, threats of discharge, and refusal to bargain, almost 39 percent of the unit, including 61 employees who had signed the decertification petition, nevertheless went out on strike.

We argued that the facts of this case well illustrated that a decertification bar is not simply a "union protection" measure as the Court of Appeals assumed. Rather, in affording a wrongfully ousted union a reasonable opportunity to reconstitute its former support, the decertification bar forwards the Section 7 rights of the majority of employees who freely manifested their support for bargaining in the 1988 and 1989 Board proceedings. Those employees were not merely unlawfully denied the services of their union representative. In addition, the predictable consequence of that injury was to damage the ability of those employees to maintain their majority, which at all times had faced substantial opposition.

To uphold all the substantive violations, as the Court did, but to nevertheless provide a remedy that exposed the supporters of collective bargaining to instant decertification, after three years of litigation, was to embrace "the doctrine of futility" that the Board rightly rejected in Inland Steel, 9 NLRB 783, 816 (1938). In other cases where employers withdrew recognition from an incumbent union on the basis of decertification activities that the employer had unlawfully influenced, the Board's bargaining orders have been upheld. NLRB v. A.W. Thompson, Inc., 449 F.2d 1333, 1336-1337 (5th Cir. 1971), cert. denied 405 U.S. 1065 (1972); Ron Tirapelli Ford, Inc. v. NLRB, 987 F.2d 433, 445 (7th Cir. 1993).

II. The Duration Of The "Reasonable Period" Of Good Faith Bargaining Necessary To Remedy An Earlier Unlawful Refusal To Bargain Should Vary With The Circumstances

Traditionally, the duration of the "reasonable period" has been determined "in each case by the bargaining issues and the circumstances which evolve once negotiations have been resumed." Federal Pacific Electric, 215 NLRB 861 (1974). As the Board recently stated:

> The test for determining what is and what is not a reasonable period of time is what transpires during the time period under scrutiny rather than the length of time elapsed . . . . The Board has considered various factors in determining what is a reasonable period of time. Among those are whether the parties are bargaining for a first contract; whether the employer engaged in meaningful good-faith negotiations over a substantial period of time; and whether an impasse in negotiations has been reached. (footnotes omitted).

King Soopers, Inc., 295 NLRB 35, 37 (1989)(footnotes omitted).

We noted the obvious disadvantage of the Board's traditional standard: it requires a post hoc evaluation of matters over which reasonable persons can and do disagree. If it were possible to devise a rule that gave the parties greater certainty about their responsibilities, that would appear to be desirable. In labor law, as in other areas, however, appearances can be deceiving. In a recent opinion, Judge Silberman has discerned a non-obvious wisdom in the Board's traditionally flexible approach:

> The Board may be unwilling to spell out *ex ante* what is a reasonable time . . . because subsequent events may bear on the issue. The Board may also be concerned, however--not unlike Presidents faced with demands for time limits on the deployment of U.S. troops--that a specified period will provide an incentive to the employer to wait out the period rather than reach a possible agreement.

Exxel/Atmos, Inc. v. NLRB, 37 F.3d 1538, 1540 (D.C. Cir. 1994) (Silberman, J., dissenting from the denial of rehearing *en banc*).

We argued that the advantage of the Board's current standard is that it is driven by functional considerations and serves to focus the parties' attention on the remedial objective of the Board's affirmative bargaining order: to restore conditions in which effective bargaining might again be possible; to afford the parties a fair chance to conclude a contract; and to demonstrate to employees that their right to bargain collectively over the terms of their employment will be respected, thereby restoring the conditions of employee free choice that were impaired by the employer's wrongful refusal to bargain. Accordingly, we argued that the Board should not alter its current standard.

Standards For Employer Withdrawal of Recognition Without a Board Conducted Election

In February 1995, the Board advised the parties it wished to hear oral argument in a prior decision which the Board had decided to reconsider: Lee Lumber & Building Material, 306 NLRB 408 (1992).

In that case, following a Board conducted election, the Union was certified in 1988 as the representative of the mill shop employees at the Company's Chicago facility. The parties signed a collective-bargaining agreement effective from May 26, 1989, through May 25, 1990. On February 1, 1990, the Union requested bargaining for a new agreement but received no definite date for the start of negotiations. The Union eventually sent the Company a letter stating that, if the Union did not hear otherwise, it would come to the Company's offices on April 11 to begin bargaining. However, on March 20, employees filed a decertification petition with the Board.

The Company did not participate in the preparation or circulation of the decertification petition or otherwise unlawfully encourage the decertification activities. However, the Company did assist the three employees involved in the delivery and processing of the petition by providing them with paid time off to file the petition and by reimbursing them $7.00 for parking at the Board's office. Based on the March 20 decertification petition, the Company refused to bargain with the Union. The Company admitted that it did not know whether a majority of unit employees

had signed the petition. The Company later changed its mind and agreed to bargain with the Union.

The parties commenced negotiations and were nearly in complete agreement when, on July 2, 1990, employees presented the Company with a second petition, signed by a majority of unit employees, stating they "will not continue to be represented by any union" and that they were "hereby decertify[ing] Carpenters Union Local 1027." On the basis of that July petition, the Company withdrew recognition from the Union.

The Board found, in agreement with the administrative law judge, that the Company unlawfully provided assistance to the employees who filed the decertification petition by granting them paid leave and reimbursing their parking costs. The Board also agreed with the judge that the Company violated the Act by delaying negotiations for six weeks on the basis of the decertification petition. As the judge noted, the Company "had no idea" whether a majority of the employees in the unit signed the petition, and, in any event, their signatures "merely expressed a desire for an election....", citing Dresser Industries, Inc., 264 NLRB 1088 (1982), and RCA Del Caribe, Inc., 262 NLRB 963 (1982). In further agreement with the judge, the Board concluded that the Company's unlawful assistance to the decertification movement and its six-week delay in bargaining tainted the second petition and therefore made unlawful the Company's withdrawal of recognition.

To remedy the Company's unlawful withdrawal of recognition, the Board entered a cease and desist order and, affirmatively, required the Company to recognize and bargain with the Union and to post a notice to employees.

The Board requested the parties to address the following issues raised by this case:

1. Whether the Company was barred from withdrawing recognition from the Union because it did not repudiate its prior unfair labor practices in a timely and effective manner.

2. Whether the Company was barred from withdrawing recognition from the Union because that withdrawal occurred prior to the employees' expressing their desires in a secret ballot election.

3. Whether an affirmative bargaining order was the appropriate remedy for the Company's protracted unlawful refusal to recognize the Union.

In our arguments to the Board, we maintained the following positions on these issues.

I. The Company Was Not Privileged To Withdraw Recognition Because It Had Not Repudiated Its Prior Unfair Labor Practices In A Timely And Effective Manner

We asked the Board to reaffirm its unfair labor practice finding based on the following proposition: an employer that unlawfully refuses to recognize and bargain with an incumbent union, but that later recognizes and bargains with the union, may not then lawfully withdraw recognition unless, at a bare minimum, the employer has first repudiated its prior unfair labor practice in a manner sufficiently timely and effective to repair the injury to employee rights caused by its disruption of the bargaining process. This proposed standard combined the teaching of two important Board decisions, Karp Metal Products Co., 51 NLRB 621, 624-627 (1943), enf'd mem. Oct. 23, 1943, cert. denied, 322 U.S. 728 (1944)("Karp"), and Passavant Memorial Area Hospital, 237 NLRB 138 (1978)("Passavant").

In Karp, the Board fully explained its reasons for thinking that a refusal to recognize and bargain is a serious interference with the right of employees to have representatives of their own choosing:

> Employees join unions in order to secure collective bargaining. Whether or not the employer bargains with a union is normally decisive of its ability to secure and retain its members. Consequently, the result of an unremedied refusal to bargain with a union, *standing alone*, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether.

51 NLRB at 624 (italics added)(footnote omitted). The Board's assessment of the serious harm to employee rights from unlawful refusals to bargain was endorsed by the Supreme Court in Franks Bros. Co. v. NLRB, 321 U.S. 702, 704 (1944)("Franks Bros.") and properly still guides the Board's decisions.

Karp likewise expresses the Board's experienced judgment concerning what must be done to remedy a wrongful refusal to bargain, namely, there must be sufficient good faith bargaining to assure employees that their choice of a bargaining representative will be respected by their employer, thereby restoring the conditions of employee free choice that were unlawfully impaired. 51 NLRB at 626-627 & n. 11.

Also relevant here was the Passavant standard, which the Board uses to evaluate the effectiveness of an employer's voluntary repudiation of an alleged interference with employees' organizational rights. 237 NLRB at 138-139. Although fashioned to evaluate attempts to repudiate threats and other coercive conduct prior to an election, the Passavant standard serves as a benchmark for measuring the adequacy of voluntary efforts to cure an unlawful refusal to bargain. As recently summarized in Gaines Electric Co., 309 NLRB 1077 (1992), for a repudiation to be effective under Passavant,

> it must be timely, unambiguous, specific in nature to the coercive conduct, and adequately published to the employees involved. In addition, it must set forth assurances to employees that no interference with their Section 7 rights will occur in the future, and in fact there must be no unlawful conduct by the employer after publication of the repudiation. Id. at 1081.

Applying the proposed standard to the facts previously found in this case, we argued that the Board should find that the Company was not privileged to withdraw recognition from the Union in July 1990 because it did not repudiate its prior unfair labor practices in a timely and effective manner. Accordingly, as the Board previously found, the Company's refusal to bargain was not "cured" at the time of the employees' second decertification petition.

When viewed from the perspective of Karp and Franks Brothers, the Company's claim that a six-week bargaining delay at a critical juncture was cured by later bargaining, was no more than an attempt to reap the benefit of the demoralizing consequences of delay on the supporters of collective-bargaining. When viewed from the perspective of Passavant, moreover, it was striking that although the Company effectively acknowledged to the Union that the law obliged it to recede from its initial refusal to bargain for

a new contract, there was no evidence that the Company took any comparable step to publish its repudiation of its unlawful conduct to employees, or to give them the requisite assurances that their Section 7 right to collective-bargaining would be respected as fully as their right to refrain.

In addition, the Company unlawfully assisting in the filing of the March 20 decertification petition, which was relevant to the Board's assessment of whether the Company's later bargaining was a sufficient repudiation of its earlier unfair labor practices. The Company's failure to ever repudiate its unlawful assistance prior to the second decertification petition in July further undermines its claim that, because of its subsequent bargaining, the second petition is a reliable measure of the employees' representational desires.

We also noted that, if the gift of $16 jackets or the payment of excessive compensation to election observers can be grounds for setting aside a secret ballot election, see Easco Tools, Inc., 248 NLRB 700 (1980); Owen-Illinois, Inc., 271 NLRB 1235 (1984), payments like those made by the employer here, which payments it never repudiated, surely were grounds for questioning the reliability of an open petition. That was especially true where that financial assistance was followed by a six-week unlawful refusal to commence bargaining for a new contract.

For the foregoing reasons, we argued that the Company's later conduct was insufficient to cure its prior refusal to bargain or its unlawful financial assistance to the employees involved in the decertification effort. Having done nothing timely and effective to restore the conditions for employee free choice that its earlier unfair labor practices had diminished, the Company could not rely on the July petition to terminate its bargaining relationship.

II. The Company Was Not Privileged To Withdraw Recognition Prior To The Employees' Expressing Their Desires In A Secret Ballot Election

The argument in the preceding section was based on the Board's prior findings and inferences in this case and its existing precedents. If the Board were disposed to reaffirm its previously stated views, it need not proceed further in this section. We acknowledged, however, that this was a case where it is open to the Board reasonably to take a different approach from that expressed in former cases. See, generally, Consolo v. FMC, 383 U.S. 607, 620

(1966)(noting that "the possibility of drawing two inconsistent conclusions from the evidence" does not impugn the reasonableness of the inference drawn by the administrative agency); NLRB v. Lovejoy Industries, Inc., 904 F.2d 397, 401-402 (7th Cir. 1990)(noting that the statute gives the Board considerable latitude in determining what kind of misconduct precludes the holding of a fair election).

Moreover, the facts of this case provided some support for the Company's claim that its later bargaining with the Union was adequate to assure its employees that their right to bargain collectively through representatives of their own choosing would be respected. For example, the parties met in five different bargaining sessions; the Company appeared to bargain in good faith; negotiations were productive and the judge accepted the Company's assessment that the parties had almost reached a complete agreement shortly before the second decertification petition. Against that background, the fact that an undisputed majority of the employees renewed their decertification efforts at a time when a contract was almost in hand could be viewed as evidence of dissatisfaction with union representation itself rather than as a lingering effect of the Company's unlawful refusal to bargain for a six-week period.

On that basis the Board could find that, under existing law, the Company was privileged to withdraw recognition on the basis of the July 20 petition. We therefore decided to direct the Board's attention to features of this case and to the anomalies in existing law that suggest existing law should be changed. We argued that the time had come for the Board to consider altering its long-standing rules that allow--indeed encourage or sometimes even require--employers to break off or alter bargaining relationships with incumbent unions on receipt of employee petitions like the July petition at issue here. See, Celanese Corp. of America, 95 NLRB 664 (1951)(withdrawal of recognition may be justified by good faith doubt of actual majority, as well as by evidence of actual loss of majority).

The Board's current policy is in some tension with the Supreme Court's long-standing dictum that an employer's self-help reliance on employee rights to break off bargaining relationships is not conducive to industrial peace. See Brooks v. NLRB, 348 U.S. 96, 103 (1954); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 50 n.16 (1987). The Board's current policy, moreover, does little to encourage employers to act in accordance with what the Supreme Court has long thought to be the Board's own view,

namely, "that even after the certification year has passed, the better practice is for an employer with doubts to keep bargaining and petition the Board for a new election or other relief." Brooks v. NLRB, supra, 348 U.S. at 104 n. 18. Under the existing rules, employers have broken off bargaining relationships on the basis of loss-of-majority evidence that, after years of litigation, turns out to involve no more than a mistaken view of the size of the bargaining unit. See Hollaender Mfg Co., 299 NLRB 466 (1990), enf'd 942 F.2d 321, 327-328 (6th Cir. 1991), cert. denied 112 S.Ct. (1992); Virginia Concrete Company, Inc., 316 NLRB No. 55 (February 8, 1995).

Since a divided Board decided Celanese Corp. of America, supra, ("Celanese"), there has been a growing awareness that a secret ballot election, which is the best means of ascertaining employee free choice, NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969), is vastly to be preferred as a means of deciding whether an incumbent union is still the choice of a majority. NLRB v. Cornerstone Builders, Inc., 963 F.2d 1075, 1077-1078 (8th Cir. 1992); Underground Service Alert, 315 NLRB No. 139, 148 LRRM 1145, 1147-48 (1994). Indeed, some courts have voiced the suspicion that the Board, while nominally adhering to Celanese's "good faith doubt" standard, has acted on the view that only proof of actual loss of majority will suffice to satisfy the good faith doubt standard. Johns-Manville Sales Corp. v. NLRB., 906 F.2d 1428, 1433 (10th Cir. 1990); Mingtree Restaurant, Inc. v. NLRB, 736 F.2d 1295, 1297 (9th Cir. 1984).

There was good reason for the Board not only to actually overrule Celanese's "good faith doubt" standard, but also to go further and adopt the following rule, which represents our alternative answer to the question the Board posed for oral argument:

> No employer may lawfully withdraw recognition from a certified bargaining representative unless, at a time when the employer is still honoring its bargaining obligation, a majority of the employees reject union representation in a secret ballot election conducted at an appropriate time and on the basis of a 30 percent showing of interest.

The present case well illustrated why our proposed rule strikes a better balance of the conflicting interests than the Board's current rules. The employees selected the Union as their bargaining representative in October 1988 in a Board-certified election. In March 1990, near the

expiration of the Union's first contract, employees conducted an informal poll in which yes or no votes were cast with some effort at protecting secrecy; the Union prevailed in that poll. Later that same month, an apparent majority signed a petition that the judge found signified a desire for a Board decertification election. Then, in July, an employee majority signed the decertification petition that the Company relies on to justify terminating its bargaining relationship.

Which expression of the employees' views represented their true representational desires? Why should decisive weight be given to the July open petition? That petition had not afforded employees the minimal procedural protections of a poll conducted in accordance with Struksnes Constr. Co., 165 NLRB 1062 (1967), and also had not complied with the rule that even a secret ballot poll conducted by an employer is not fair or reliable if the incumbent union has not been provided with advance notice of the poll. Texas Petrochemicals Corp., 296 NLRB 1057 (1989), modified on other grounds 923 F.2d 398, 403 (5th Cir. 1991).

Existing law, we argued, did not afford good enough answers to the foregoing questions. No matter how the Board resolved the issue of whether or not the employees' July decertification petition was tainted, that kind of fact-intensive, highly nuanced examination of the circumstances in which an employee petition may be sufficient evidence of loss of majority warranting employer self-help was, on balance, an example of misdirected energy. As the District of Columbia Circuit observed generally about the good faith doubt standard in Peoples Gas Sys. v. NLRB, 629 F.2d 35, 43, 44 (1980):

> The problem with this case-by-case approach is that both the employer and the Union are subject to the shifting views of the members of the Board and the courts as to what evidence is sufficiently "objective" and convincing to demonstrate good faith doubt . . . . Obviously, an automatic right to insist on an election . . . would not be appropriate in withdrawal of recognition cases. Nevertheless, a clear-cut, objective standard governing the conditions under which an employer will be permitted to challenge a Union's status would seem preferable to the present procedures and standards which leave both the Company and the Union in the dark as to when a challenge can be made, often

> require years to resolve, and run a substantial risk of frustrating actual employee wishes simply because the Board is not satisfied with the Company's ability to identify and articulate the reasons for its doubt about the Union's support.

Accordingly, we argued, it would be appropriate for the Board to rethink the desirability of maintaining rules that invite litigation directed at determining whether an inferior means of ascertaining employee free choice should be allowed to justify the rupture of a bargaining relationship.

The present case suggested that the present rules may not well serve either the interest in fostering employee free choice, or the interest in stabilizing existing bargaining relationships. If the Company had continued bargaining, pending the outcome of the election, after it received the employees' July petition, as we argued it should have, the Company thereby would have removed the principal reason for claiming that the prompt holding of a Board-conducted election would be an unfair test of the Union's majority status.

The remaining violation that the Board found was the Company's financial assistance to the three employees involved in filing and processing the March decertification petition. Passavant and its progeny provide all the practical tools needed to remove such an obstacle to the conduct of an election: whether or not the Company agrees that the payments were an interference with free choice, it could nevertheless agree to give the employees notice of the charge and of the employees' undisputed right to exercise free choice for or against union representation without interference, restraint or coercion. Cf. Stanton Industries, Inc., 313 NLRB 838, 848-850 (1994). An employer willing to give such notice could persuasively blunt objection to the prompt conduct of an election. An employer unwilling to give such notice is in a poor position to object if an election is deferred on that account.

Without denying that the approach suggested here may not have disadvantages of its own, and recognizing that we cannot precisely foresee all the consequences of changing the Board's traditional approach, we nevertheless suggested that a flat rule requiring that the employer's evidence of loss of majority be tested in a secret ballot election before withdrawal of recognition is permitted would be more consistent with developing standards, more easily

administered, and, importantly, more readily enforced under both Sections 10(e) and 10(j) of the Act.

Three features of our proposed rule warranted brief explanation. First, the limitation that the employer who would withdraw recognition from an incumbent union must await the results of a secret ballot election held at an "appropriate time" incorporated the settled body of Board law associated with that phrase. We anticipate that the issue of when a Board election should be blocked by unfair labor practice charges will continue to be the most controversial issue in that body of law and recognize that other cases may raise more difficult blocking charge issues than the relatively straightforward ones presented on the facts here. We see no escape from that difficulty other than continuing (and refining) the Agency's commitment to exercise sound discretion in its blocking charge decisions and striving to resolve such issues as rapidly as possible. See Big Three Industries, Inc., 201 NLRB 197, 197-198 (1973), aff'd 497 F.2d 43 (5th Cir. 1974). The decisive issue is whether, pending the outcome of that investigation, the representational status quo must be maintained, as we proposed, or whether it may be unilaterally disrupted through employer self-help, as is the current law.

Second, the limitation that the employer who would withdraw recognition from an incumbent union must await the results of "a secret ballot election" was not intended to restrict the parties to a Board-conducted election. Rather, our proposal also contemplated the conduct of private elections in accordance with procedures mutually agreed to by the employer and the incumbent union. Our proposal did not contemplate, however, that a unilateral employer poll conducted in accordance with the Board's Texas Petrochemicals standard would remain a valid basis for breaking off an existing bargaining relationship. Such an employer-controlled procedure does not ensure that the incumbent union will have an adequate opportunity to rally its supporters.

Finally, in suggesting a rule that would allow elections if at least 30 percent of the employees have expressed opposition to being represented by the incumbent union, we were proposing that the 30 percent standard now applied to employee petitions be applied to employer petitions as well. This was a position mid-way between the Board's original view when Section 9(c)(1)(B) of the Act was enacted and the current 50 percent standard set forth in United States Gypsum Co., 157 NLRB 652, 654-656 (1966). We assume that employers will use Texas Petrochemical polls to

meet the proposed new standard for Board elections. In the context of a new rule requiring employers to continue bargaining with the incumbent during the pendency of any election, we proposed that the Board change existing law to permit such polls to be conducted when the employer has objective reason for believing that a substantial number of employees, at least 30 percent, no longer desire union representation. Absent unusual circumstances, a vote of at least 30 percent against continued union representation in the poll would be conclusive of any claim that the employer lacked reasonable grounds for conducting the poll.

Under the procedures we proposed, secret ballot elections would be more readily available to employers than they are under present rules. The criticisms that the Board's current standard for employer-initiated elections is unduly rigorous and unfair would thereby be eliminated. See, e.g., NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 797 (1990)(Rehnquist, C.J., concurring); id. at 799-800 n. 3 (Blackmun, J., dissenting). The new restriction on employer self-help would, by the same token, be more acceptable. On balance, we argued, such new procedures would better serve the public interest than the Board's current approach.

III. An Affirmative Bargaining Order Was The Appropriate Remedy For The Company's Protracted Unlawful Refusal To Recognize The Union

If the Board were to reaffirm its prior finding that the Company had unlawfully withdrawn recognition in response to the employees' July petition, it would then heed to decide whether that violation warranted an affirmative bargaining order. For the reasons stated in our position statement in Caterair International, 309 NLRB 869 (1992), 22 F.3d 1114 (D.C. Cir. 1994), discussed earlier in this report, we contended that the traditional affirmative bargaining order, with its attendant bar of decertification petitions for a reasonable period, was the appropriate remedy.

Reasonable Period of Time for Bargaining To Remedy An Unlawful Refusal to Bargain

Our next reported case involved whether the Employer, who had entered into a settlement agreement under which it agreed to recognize and bargain with the Union, had bargained with the Union for a reasonable period of time

before withdrawing recognition based upon the filing of a decertification petition.

For some 30 years, the Union had represented the employees of the Employer's predecessor. On November 19, 1992, the Employer purchased certain of the predecessor's assets and then declined a request by the Union to bargain. By November 23, 1992, the Employer had begun operations with 15 production and maintenance employees, eleven of whom had been former unit employees of the predecessor. In December 1992, the Union again requested recognition on the grounds that the Employer was a successor under NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972). The Employer denied the Union's request, stating that it was planning to expand its employment.

The Union filed a Section 8(a)(5) charge and we authorized the issuance of a complaint. On October 21, 1993, the Employer signed a unilateral informal settlement agreement, which provided that it would cease and desist from refusing to bargain with the Union. On November 4, 1993, almost a year after the Employer had withdrawn recognition, the Region approved the settlement. On February 8, 1994, following the completion of the posting period, the Region closed that case.

During the 4-month period between November 29, 1993 and March 31, 1994, the Employer supplied requested bargaining information to the Union. The parties met eight times for bargaining, each session lasting between two and five hours with both parties making numerous proposals. The parties eventually agreed to clauses on recognition, union representation or shop stewards, safety, sick leave and vacations, a health and welfare plan, and management rights. They had not yet agreed on wages and language governing promotions and transfer. However, the parties had been moving towards agreement and there was no evidence of impasse.

On April 4, at a time when there were 28 employees in the unit, an employee filed an RD petition supported by a majority of those unit employees. When the Employer withdrew recognition based upon the petition, the Union filed the charge in this case.

We decided that the Employer, after entering into a settlement agreement in which it undertook to bargain, then failed to bargain for a reasonable period of time before withdrawing recognition.

First, we argued that under existing law, the Employer failed to bargain for a reasonable period of time.

The Board has long held that "a settlement agreement containing a bargaining provision, if it is to achieve its purpose, must be treated as giving the parties thereto a reasonable time in which to conclude a contract," without regard to whether or not there are fluctuations in the majority status of the union during that period. Poole Foundry and Machine Company, 95 NLRB 34, 36 (1951), enfd. 192 F. 2d 740 (4th Cir. 1951), cert. den. 342 U.S. 954 (1952). "[R]easonable does not depend upon either the passage of time or the number of calendar days on which the parties met. Rather, the issue turns on what transpired during those meetings and what was accomplished." Brennan's Cadillac, 231 NLRB 225, 226 (1977). "The determination of what constitutes 'a reasonable time' depends upon the particular circumstances involved. What is reasonable in one case may not be so in another. Thus, the Board has held that where the parties had reached a bargaining impasse, and 2 months had elapsed from the time of the execution of the settlement agreement to the refusal to bargain, this was 'a reasonable time'. [footnote omitted]. But, where the parties had not reached an impasse in negotiations, 6 months was held not to be 'a reasonable time'." [citation omitted]. N.J. MacDonald & Sons, Inc., 155 NLRB 67, 71 (1965), enfd. per curiam ___ F. 2d ___, 16 Ct. D. 966 (1st Cir. 1966).

Applying that standard, the Board in N.J. MacDonald held that an employer violated Section 8(a)(5) by refusing to further bargain with the union six months after the effective date of a settlement agreement that had contained a bargaining provision, despite the employer's contentions that the union no longer enjoyed majority status as shown by an employee petition withdrawing designation of the union. The violation which the settlement addressed was an unlawful refusal to bargain which had lasted for three months. The parties had met in nine negotiation meetings over a four-month period. Each of the meetings produced agreement on various contract terms. The Board reasoned that the union had not been afforded a reasonable time after the settlement agreement within which to bargain; the parties were negotiating their first contract; there had been no impasse reached in negotiations; and the parties had made substantial progress in negotiations.

Similarly, in Ted Mansour's Market, 199 NLRB 218 (1972), a successor employer violated Section 8(a)(5) when, four months after it had entered into a settlement agreement under which it agreed to recognize the union and abide by

the predecessor's collective-bargaining contract, it refused to bargain with the union because a majority of its employees had signed a decertification petition. There, the ALJ, adopted by the Board, found that the employer had not given the union reasonable time to effectuate the settlement agreement. The ALJ stated that whether a reasonable period had passed depends

> not only upon the length of time which had elapsed since the settlement, but also upon the conduct which is to be remedied and the likelihood that it had been remedied at the time the Union's majority was challenged.

The Board noted that the settlement was intended to remedy a denial of the union's contract rights which had continued for over a year and a half until the settlement, during which time the union's representative status had been denied and undermined. In these circumstances, "it was not likely that the [four months] recognition of the union and adherence to the contract terms ...was sufficient for the repudiation of the Union's representative status to be dissipated." Id.

In our case, the Employer had refused the Union's several requests to bargain, the first of which occurred on November 23, 1992. The Employer had then executed a settlement agreement in late October 1993, eleven months after the Union's initial request to bargain. Bargaining did not commence for another month. During the four months of bargaining between November 29, 1993 and March 31, 1994, the parties had met eight times, reached agreement on numerous issues, and had been moving toward agreement. There was no evidence of impasse. In sum, there were eleven months when the Employer operated nonunion, an additional month before bargaining commenced, and then only four months of bargaining.

In these circumstances, as in the above cited cases, it cannot be said that the Employer had negotiated for a sufficient period of time for collective bargaining to succeed, and for the "repudiation of the Union's representative status to be dissipated." Indeed, we noted that here, as in N.J. MacDonald, supra, the parties were negotiating their first contract, there had been no impasse, and the parties had made substantial progress in negotiation. To permit the withdrawal of recognition in these circumstances would not, in our view, be conducive to industrial peace or stable labor relations.

We then decided to ask the Board to clarify the rules as to what constitutes a reasonable period for bargaining. In this regard, we decided to propose to the Board that, absent extraordinary circumstances, the reasonable period for bargaining pursuant to a Board bargaining order, a settlement agreement, or a voluntary recognition, should all be the same as if the original bargaining had commenced after a certification.

First, we argued that the Board's current reasonable period standard is difficult for the public to understand and difficult for the Board's Regional Offices to administer. The Board's holdings in this area have little predictive value and are difficult to reconcile, since the Board looks at the facts of each case to determine whether the employer has bargained for a reasonable period. Compare Brennan's Cadillac, supra, and Tajon, Inc., 269 NLRB 327 (1984), with N.J. MacDonald & Sons, supra, Ted Mansour's Market, and Blue Valley Machine & Mfg. Co., 180 NLRB 298 (1969), enfd. in rel part 436 F.2d 649 (8th Cir. 1971).

In MacDonald, the Board noted that two months of bargaining was reasonable in one case, four months insufficient in other cases, but that six months was insufficient in the case before it. In Satilla Rural Electric Membership Corporation, 155 NLRB 747 (1965), nine months was an insufficient period of bargaining. In Blue Valley Machine, six months was insufficient. In Tajon, Inc., eleven weeks was reasonable. In VIP Limousine, Inc., 276 NLRB 871 (1985), ten months was insufficient.

Second, a review of the factors which have guided the Board's decision making in this area also produces little of predictive value since the Board emphasizes different factors in the various cases. In MacDonald, the Board said that the operative factors were that bargaining was for the first contract, there was no impasse, and negotiations were fruitful. In Satilla Rural Electric Membership Corporation, the Board said that bargaining must have "a fair chance to succeed." 155 NLRB at 749. In Ted Mansour's Market, the ALJ, adopted by the Board, looked to the length of time which had elapsed since the settlement and to the conduct which was to be remedied and to the likelihood that it had been remedied in the time period. In Brennan's Cadillac, Inc., the Board looked to what happened during the bargaining sessions, and to whether there were any employer unfair labor practices. In VIP Limousine, Inc., the ALJ, adopted by the Board, found that the employer avoided the bargaining obligation all along. In sum, the factors the

Board deems important are unclear and seem to fluctuate, and their application does not appear consistent.

Third, the absence of certainty about the length of the reasonable period may impede the bargaining process. For example, if employees become dissatisfied with their bargaining agent six months after the Board has issued a bargaining order, the union may become overly concerned with the possibility that a withdrawal of recognition will be lawful. This could lead the union to not request relevant information for fear of delay; to settle for a contract less advantageous to the employees; and/or to urge the employees to strike. None of these events would occur if there were a bright line so that the length of the required period for bargaining was known in advance.

In an analogous situation, where the period of bargaining is preceded by a certification, the Board's rule under Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962), described below, creates predictability for the parties and the Regional Offices. Under Mar-Jac, which has received judicial approval, see Brooks v. NLRB, 348 U.S. 96 (1954), a certification based on a Board-conducted election must be honored for a reasonable period, ordinarily one year, in the absence of unusual circumstances.

In Mar-Jac, the employer filed a petition for an election 16 months after certification. The Board dismissed the petition in circumstances where the successor employer, who had refused to bargain with the union, had entered into a settlement agreement in which it had agreed to bargain in good faith, and thereafter had bargained for only 6 months. As a remedy, the Board held that "the obligation to bargain continues for at least an additional six months from the resumption of negotiations." 136 NLRB at 787, n.6. The Board specifically stated that in that case, and in future cases, the Board would require an employer to bargain for one year after a settlement agreement.

In Colfor, Inc. 282 NLRB 1173, 1175 (1987), enfd. in rel. part 400 F.2d 713, 69 LRRM 2081 (5th Cir. 1968), the Board in a prior test of certification 8(a)(5) case had ordered the employer to bargain for one year after the beginning of good faith bargaining. The Board expanded on Mar-Jac and extended the certification year for 6 months in a second refusal to bargain case based on an illegal impasse, even though the parties had previously bargained a total of 10 months. The Board reasoned:

> Although the so-called Mar-Jac remedy (136 NLRB 785, 787 (1962)) is typically designed to provide an aggrieved labor organization with 1 year's time in which to negotiate a collective-bargaining agreement, we do not believe the Board is powerless to order, under proper circumstances, a complete renewal of a certification year, even in cases where there has been good-faith bargaining in the prior certification year. Such a position takes cognizance not only of the realities of the effect of any bad-faith bargaining in the prior year, but also, more importantly, of that policy embedded in the Act which seeks to have the relationship between covered employees and their employers determined by the bargaining process and then reduced to written contract form. 282 NLRB at 1174-75.

Mar-Jac had been applied where the employer ignores, or tests, the certification by refusing to bargain, see e.g. A.P.R.A. Fuel Oil, 312 NLRB 471 (1993), and in cases where bargaining has never had a chance to get seriously and fairly underway, see, e.g., D.J. Electrical Contracting, 303 NLRB 820, n.2 (1991). In both situations, the remedial certification period is for a full year, and the Board "construe[s] the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union." A.P.R.A. Fuel Oil, 312 NLRB 471, 473 (1993). Accord: Van Dorn Plastic Machinery Co., 300 NLRB 278, 279 (1990), enfd. 939 F.2d 402, 138 LRRM 2102 (6th Cir. 1991). Where the employer has bargained in good faith for part of the certification year, the employer receives credit for that part of the year in which he has bargained. However, as found in Colfor, if an employer has bargained in good faith for more than 6-months, the Board will require bargaining for at least 6 additional months to increase the chances for successful contract negotiations.

The same rules apply whether the post-certification conduct is considered in an R or a C case and without regard to whether the unfair labor practice charges culminated in a Board Order or a settlement. The Board has also applied Mar-Jac principles in a non-Board settlement case. See Gebhardt-Vogel Tanning Co., 158 NLRB 913 (1965).

We noted that the Mar-Jac rule has worked successfully and has simplified the administration of the Act for the public and the Regional Offices. In addition, the policies underlying Mar-Jac are similar to the policies operative where bargaining commences pursuant to a Board bargaining Order or settlement.

The Mar-Jac rule relied on Section 9(c)(3) of the Act, the election year rule, which bars the direction of an election in any unit in which a valid election has been held in the past twelve months. Mar-Jac stated that the purpose of the election year rule is "to insure the parties a reasonable time in which to bargain without outside interference or pressure..." 136 NLRB at 786. The Board noted that "[a]mong the reasons supporting the adoption of this rule is to give a certified union 'ample time for carrying out its mandate' and to prevent an employer from knowing that 'if he dilly-dallies or subtly undermines, union strength' he may erode that strength and relieve himself of his duty to bargain." Id. at 786-787. Mar-Jac recognized that the certification year rule is itself an extension of the purpose underlying the election year rule, and applied an analog of the certification year rule to a situation in which the Board believed the same purpose should be effectuated. We argued that the same policies of the Act are implicated when parties are bargaining pursuant to a bargaining order.

Finally, requiring at least one year of bargaining after a bargaining order, settlement agreement, or voluntary recognition, would be consistent with language in prior Board decisions where the Board stated that "an order to bargain with a union is in many respects tantamount to a certification." The Cuffman Lumber Co., 82 NLRB 296, 298 (1949); Marshall and Bruce Co., 75 NLRB 90, 95-96 (1947)

In sum, we decided to argue that there is no good reason for the radical distinction between the consequences of a certification and the consequences of a bargaining order, settlement agreement or voluntary recognition. Therefore, absent extraordinary circumstances, a one-year period of bargaining is a minimum for bargaining pursuant to a Board order, settlement, or voluntary recognition.

The Refusal to Bargain Case In Major League Baseball

During this reporting period, we were confronted with charges filed by the Major League Baseball Players Association alleging that the baseball club owners had refused to bargain in good faith by unilaterally changing some terms and conditions of employment without first bargaining to a good faith impasse.

The Major League Baseball Players Association (the Union) had represented all players on the 40-man roster of

the 28 constituent clubs of Major League baseball since 1966. The contract between the Union and the Major League Baseball Player Relations Committee, Inc. (the PRC) expired on December 31, 1993.

For roughly 125 years, baseball players had bargained individual contracts setting their salaries with major league baseball clubs. Since 1966, the Union had established in bargaining with the Clubs the structure within which individual players and individual clubs engaged in direct bargaining for individual player contracts (Uniform Player's Contract or UPC). The salary and duration of each UPC were established in direct negotiations between the individual club and the individual player.

Prior to 1976, all players had been employed under a "reserve system" in which they were permanently "reserved" to an individual club. A player was permitted to negotiate compensation and other terms and conditions of employment only with the club to which he was reserved. In 1976, the parties agreed to a contractual provision that provided for "free agency". The negotiated free agency system provided players who had completed six major league seasons with the opportunity to offer their services to all Owners and to seek competing bids in an effort to obtain the best possible contract. Article XX(F) of the Basic Agreement guaranteed that Owners would not act in concert with other Owners.

Those players who had not yet attained free agency status remained under "reserve" to their individual club. The contract gave certain reserve players the right to demand salary arbitration. If an Owner and eligible player could not agree to a salary figure, either party could insist, "without the consent of the other", that the figure be set in salary arbitration. Prior to the salary arbitration hearing, the player and the Owner signed a UPC and each submitted a salary figure to the arbitrator. The contract limited the arbitrator to awarding only one of the two figures submitted and required the arbitrator to render a decision, without opinion, within 24 hours.

Negotiations for a successor agreement began in March 1994. The Union commenced a strike on August 12. During the strike, negotiations continued with various proposals being presented. The Owners wanted a "salary cap"; the Union countered with a revenue sharing and "salary tax" plan. On December 22, prior to impasse, the Owners declared an impasse and announced their intention to immediately implement a salary cap and other changes in terms and conditions of employment, including the elimination of

salary arbitration. Both sides filed unfair labor practice charges.

In an effort to resolve the charges filed by the Union, the Owners notified the General Counsel on February 3, 1995 that they would restore the status quo that existed prior to implementation. However, the Owners notified the Union on February 6 that they were abandoning their adherence to the following terms: individual clubs/individual player negotiations; salary arbitration; and Article XX(F), the anti-collusion provision of the contract. The Owners viewed these terms as permissive subjects of bargaining. As a result, the Owners stated that all arbitration eligible players under reserve would be tendered old form UPC's that would be revised to eliminate any salary arbitration rights. With respect to free agents, the Owners intended to negotiate with them over mandatory terms, including salary and assignment, as a single employer. In essence, the Owners were going to "collude" with each other as to players' salaries and assignments.

Based on the above described facts, we decided that the Owners violated Sections 8(a)(1) and (5) by unilaterally eliminating contractual provisions providing for (1) competitive bidding for free agent players; and (2) salary arbitration for reserve players, since these provisions were mandatory subjects of bargaining.

We reasoned as follows: First, existing case law established that the constituent parts of a free agency and reserve system were mandatory subjects of bargaining in professional sports; competition for free agents was an essential part of free agency and was therefore itself mandatory. And second, the Owners violated the Katz principle by abrogating competitive bidding for free agents, Article XX(F) and salary arbitration. NLRB v. Katz, 369 U.S. 736. Further, neither the Owners' right to designate their bargaining representative, nor unit issues, privileged their conduct. A district court granted the Board's request for Section 10(j) injunctive relief based on these theories.

I. Free Agency and the Reserve System Are Mandatory Subjects of Bargaining.

In professional sports, a player reserve system is the primary determinant of an employee's club assignment and wages. The courts, in a series of anti-trust cases, have clearly held that the unique structure of free-agency/reserve systems in the sports industry are protected from anti-trust attack because they are mandatory subjects of bargaining. Wood v. National Baseball Association, 809

F.2d 954 (2d Cir. 1987); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976). See also, McCourt v. California Sports, 600 F.2d 1193, 1194-95, n.2, 1198 (6th Cir. 1979); Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989); NBA v. Williams, 148 LRRM 2368 (2d Cir. 1995).

We decided that salary arbitration in this case was also part of the negotiated reserve system and under the rationale of the anti-trust cases, a mandatory subject of bargaining. Indeed, salary arbitration functioned similarly to the right of the first refusal provisions that were explicitly considered and held mandatory in Wood, Williams, and Powell. Thus, like the right of first refusal, which allows a team to retain a player if it agrees to match the salary offer obtained by bidding from competing clubs, salary arbitration was a mechanism or structure to compel the consideration of free-market values in establishing the salaries of eligible reserve players. Because the reserve players submitted the salaries of comparable free agents as evidence in support of their salary requests, salary arbitration served as a bridge between the free-market value of free agents and the wages of reserved players.

In concluding that salary arbitration here was a mandatory subject of bargaining, we distinguished traditional interest arbitration which is a permissive subject of bargaining. See e.g. George Koch & Sons, 306 NLRB 834, 839 (1992); Tampa Sheet Metal Co., 288 NLRB 322, 325 (1988). We relied instead on Board cases which found that certain interest arbitration provisions were mandatory. For example, in Sea Bay Manor Home, 253 NLRB 739 (1980), enfd. mem. 685 F.2d 425 (2d Cir. 1982), the Board held that an employer violated Section 8(a)(5) by refusing to abide by a stipulation agreement to submit the contract under negotiation to interest arbitration, since the "agreement to arbitrate was so intertwined and inseparable from the mandatory terms for the contract currently being negotiated as to take on the characteristics of the mandatory subjects themselves." Further, in Columbia University, 298 NLRB 941 (1980), the Board held that the interest arbitration clause there was mandatory since it had an immediate effect on wages and terms of employment.

Further, in distinguishing traditional interest arbitration cases, we reasoned that salary arbitration here did not establish the term of a future contract since, when a player eligible for salary arbitration invoked Article VI(F) (salary arbitration) to establish his wage rate during the term of the UPC, he was considered signed under that UPC

at the time he elected salary arbitration. Further, while salary arbitration contained third-party procedural elements, the arbitrator was, by agreement of the parties and unlike traditional interest arbitration clauses, extremely limited in both the substantive matter he could consider and the time in which he must issue a decision.

We further concluded that competitive bidding was itself a mandatory subject of bargaining because it was the essential feature of free agency. The anti-trust decisions recognized that competitive bidding among teams is the mechanism of a free agency/reserve system by which a player realizes his market value, and that contract provisions that are premised on competitive bidding for the services of individual free agents are mandatory in nature. Further, the essence of collective bargaining in professional sports is the establishment and maintenance of reserve and free agency systems in which owners agree to bid competitively for some players, and collectively for others. In short, free agency is synonymous with competitive bidding. It followed that the anti-collusion provision of the expired Basic Agreement here (Article XX(F)), in which the individual Owners were not to act in concert with each other, was also a mandatory subject of bargaining.

This conclusion was also entirely consistent with the Supreme Court's decision in Pittsburgh Plate Glass, 404 U.S. 157 (1971). In that case, the Court observed that mandatory subjects are those which "vitally affect" the terms and conditions of employment of bargaining unit employees. This was so in our case because the free agency/reserve system had an immediate effect on the players wages and mobility. We relied on numerous other cases in which the courts applied a similar analysis to find mandatory contractual provisions that did not appear, on their face, to directly address terms and conditions of employment. See Teamsters Union v. Oliver, 358 U.S. 283 (1959) (contractual restrictions on leasing arrangements between independent contractor and employer bear close relation to labor's efforts to improve working conditions and thus are mandatory); Local 189 Meatcutter v. Jewell Tea Co., 381 U.S. 676 (1965) (collectively bargained provision against marketing meat at night mandatory); Federation of Musicians v. Carroll, 391 U.S. 99 (1968) (union regulation mandating a "Price List" for orchestra leaders necessary to insure that scale wages are paid).

II. The Owners Violated The Katz Principle By Abrogating Competition For Free Agents And Salary Arbitration

The Owners consistently proposed to the Union throughout negotiations the continuation of competitive bidding for free agents. Thus, the Owners sought to reclaim bargaining authority from individual clubs only during the contract hiatus. The Owners admitted that the sole purposes of their unilateral changes was to preserve the Clubs' ability to negotiate new contract terms for 1995 and beyond. Thus, we reasoned that the elimination of Article XX(F) and competitive bidding was nothing more than an attempt to utilize unilateral changes as an economic weapon during bargaining, precisely the conduct the Supreme Court deemed violative of Section (a)(5) in Katz.

In these circumstances, we rejected the Owners' arguments that the free agency/reserve provisions of the expired contract implicated the Owner's Section 8(b)(1)(B) right to select its own bargaining representative, or altered the status of the PRC as the designated representative of all 28 clubs for bargaining a new contract. We reasoned that the Owners could, if they successfully bargained, end the free agency and salary arbitration systems, exclude the anti-collusion provision, and create an entirely new system. Thus, we reasoned that to maintain the status quo, the Owners were obligated to abide by the free agency terms, including competitive bidding, until good-faith impasse or agreement.

Disclosing The Percentage Of Employees Who Sign A Decertification Election Petition

During this period, we considered the question of whether the Board should advise an employer of the percentage of employees who signed a decertification petition.

In a recent Board case, the Board adopted the decision of an administrative law judge who found that the employer had violated Section 8(a)(1) and (5) by refusing to meet and bargain with the union and by refusing to furnish it with requested information. The ALJ concluded that the employer had refused to meet and bargain because a unit employee had filed a decertification petition. The Board applied for enforcement with the Third Circuit Court of Appeals, and the employer filed a cross petition for review.

The Third Circuit denied enforcement of the Board order. The court noted that an employer may lawfully withdraw recognition of a union which no longer enjoys majority support among unit employees. The court also noted

that under Dresser Industries, Inc., 264 NLRB 1088 (1982), the mere filing of a decertification petition does not give an employer reasonable grounds to doubt the majority status of a union because a valid petition requires the signatures of only 30 percent of unit employees. However, the court criticized the Board for holding that the employer unlawfully failed to bargain with the union where the Board possessed the decertification petition which would have enabled the employer to make an informed decision as to whether the union had in fact lost majority support. The court then remanded the cases to the Board to determine whether to inform the employer of the percentage of employees supporting the decertification petition. The court specifically stated that it would not follow Dresser should the Board continue to refuse to reply to employer requests for information about the support behind a decertification petition.

The Regional Director found that the decertification petition was not supported by a majority of unit employees.

After studying the court's remand, we decided to argue to the Board that the employer should be told that only a minority of employees had signed the decertification petition. We also decided to argue that the Board should adopt a new policy whereby no employer may lawfully withdraw recognition from a collective-bargaining representative unless, at a time when the employer is still honoring its bargaining obligation, a majority of unit employees reject union representation in a secret ballot election conducted at an appropriate time and on the basis of a 30 percent showing of interest. Finally, we decided to argue that if the Board rejects the above policy, the Board should routinely inform requesting employers whether a showing of interest in an RD case is supported by a majority of unit employees.

In Celanese Corp. of America, 95 NLRB 664 (1951), the Board held that upon the expiration of either the certification year or a contract, an employer may withdraw recognition from a union if either the union has in fact lost majority support or the employer has a good-faith doubt of the union's majority status supported by objective considerations. As noted above, Dresser Industries holds that the filing of a decertification petition, standing alone, does not provide a good-faith doubt.

In Lee Lumber and Building Material Corp., 306 NLRB 408 (1992), now pending before the Board and described earlier in this report, we argued that the Celanese "good-faith

doubt" standard should be overturned to prevent employers with doubts that a union has majority status from resorting to self help -- withdrawal of recognition. We argued that the employers instead should use the better practice of proceeding to a Board election in which employees can freely express their desires concerning union representation. Relying on our argument in Lee Lumber, we decided that in this case, we would similarly invite the Board to overrule the Celanese "good-faith doubt" standard in favor of the rule set forth above.

We then noted that adoption of the new rule proposed above would make this case moot, because the employer could not withdraw recognition and refuse to bargain absent an election in which a majority of voting employees rejected union representation. Such a result would not directly address the Third Circuit's rejection of Dresser. Therefore, we decided to inform the employer that the showing of interest was supported by only a minority of the bargaining unit employees. We noted, however, that Regional Directors have always released this information in an oblique manner pursuant to the long-standing practice of General Counsels to dismiss charges alleging that an employer unlawfully withdrew recognition after a certification year or after expiration of a contract when the union has in fact lost majority standing without any unlawful interference by the employer. It follows that issuance of a complaint alleging a Dresser violation implicitly bespeaks our finding that the decertification petition lacks majority support.

Finally, we decided to further argue that if the Board should decline to adopt the proposed new rule as a replacement for the Celanese standard, the Board should implement a policy whereby Regional Directors routinely tell requesting employers when a majority of unit employees support an RD petition's showing of interest. This policy is consistent with Office of the General Counsels' long-standing practice, supra, of dismissing unfair labor practice charges alleging a withdrawal of recognition of minority unions, as well as Board precedent dismissing such charges when the withdrawal occurs during the pendency of a decertification case. By following such a policy, the Board will no longer force employers unilaterally to withdraw recognition, possibly in violation of Section 8(a)(5), in order to test a union's continued majority status after a decertification petition is filed.

We acknowledged that a Regional Director's divulging of such information prior to an election may lead some

employers to sidestep the election process by withdrawing recognition. Since such a withdrawal of recognition under these circumstances is lawful under Celanese, we concluded that the decline in the number of meritorious refusal to bargain charges which would result from the adoption of the proposed new policy would outweigh any reduction in the use of the Board's election processes as the preferred method by which to resolve questions concerning representation.

Refusal to Consider Unit Employee Participation in Nonunit Employee Stock Purchase Plan

We considered in another case the legality of an employer's refusal to consider - on grounds that such participation would set a precedent for other bargaining units - a union's demand for participation in the same employee stock purchase plan available to unrepresented employees.

The Union had been certified as representative of a technical unit of about 20 employees at one of the Employer"s nationwide facilities. The parties had engaged in extensive contract renewal negotiations and had reached agreement on a number of significant issues. However, they were unable to agree on the Union's demand that unit employees be allowed to participate in the Employer's company-wide employee stock purchase plan (ESPP), a retirement plan which was then available only to unrepresented employees. The distinguishing feature of the plan was the requirement for matching Employer contributions of up to ten percent of an employee's gross income.

The Employer advanced two principal objections to unit participation in the plan: the cost factor, in that unit participation would increase labor costs by ten percent; and the precedent that would be created by allowing this group of unionized employees into the plan. With respect to cost, the Union emphasized that its only goal was participation in the plan and that it would meet any conditions, economic or otherwise, necessary to realize that goal. Thus, the Union advised that it would grant any changes required to make unit employees' terms and conditions of employment equivalent to those of other employees at the facility in order to justify unit participation in the plan, and that unit employees would bear any cost of participation in the plan equivalent to that of unrepresented employees.

The Employer responded that, regardless of the zero impact on Employer costs, its rejection of unit

participation in ESPP was based on its bargaining strength, since 95% of its operations were non-union and no represented group participated in the plan, with or without matching contributions. The Employer explained that it had approximately 20 labor contracts and that while one of them would certainly "break the ice" someday, the Employer did not want to make this contract the ice breaker. The Employer stated that, once one falls, some if not most of the remaining ones would follow, with resultant increased labor costs. Thus, if such a trend is to be set, it would have to happen within a much larger bargaining unit, not one as small as the instant 20-man unit. The Employer further advised that it would declare impasse on this issue. In response to the question as to how the Union could meet the precedent argument the Employer replied that the Union would have to wait until a big group got the plan first.

We concluded that the Employer's insistence on excluding unit employees from participation in ESPP in order to avoid setting a precedent for other bargaining units, in circumstances where the Union has addressed all the Employer's financial concerns, was violative of Sections 8(a)(1), (3) and (5) of the Act.

Although there was no evidence of an express intent to undermine the Union, the Employer's bargaining position was deemed violative of Section 8(a)(3) in that it discriminated between unit and non-unit employees regarding eligibility for participation in the ESPP. Cf. The Kroger Co., 164 NLRB 362 (1967), enfd. 401 F.2d 682 (6th Cir. 1968); Toffenetti Restaurant Co., 136 NLRB 1156 (1962), enfd. 311 F.2d 219 (2nd Cir. 1962). Inasmuch as this position inherently discouraged union membership, proof of unlawful motive was not deemed necessary. NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); Radio Officers Union v. N.L.R.B., 347 U.S. 17, 51 (1954); The Kroger Co., supra, at 374.

Further, the Employer's position went beyond mere failure to acquiesce in the Union's demand, which would have been lawful, but rather was tantamount to an unlawful refusal to confine bargaining to the appropriate unit. In this respect, the Employer "tipped its hand" by conceding that the reason for rejection of the Union's participation in ESPP was its precedent-setting potential vis-a-vis other bargaining units, a position which, in effect, unlawfully conditioned bargaining on extra-unit considerations, or nonmmandatory subjects. N.L.R.B. v. Borg-Worner Corporation, Wooster Division, 356 U.S. 342 (1985). While the Employer was under no duty to yield on ESPP, it could not justify its refusal to yield on ESPP by reference to

non-unit considerations. See Homestead Nursing and Rehabilitation Center, 310 NLRB 678 (1993); Operating Engineers Local 428 (Phelps Dodge Corporation), 184 NLRB 976 (1970), enf. den. 459 F.2d 374 (3rd Cir. 1972); A.D. Cheatham Painting Company, 126 NLRB 997, 1002 (1960).

Finally, the Employer's bargaining based on "precedent" as related to other bargaining units was deemed to violate Section 8(a)(1) in that it restrained and coerced the employees in their right to bargain collectively through their chosen representative (The B.F. Goodrich Co., 195 NLRB 914, 915 (1972); The Rangaire Corporation, 157 NLRB 682, 684 (1966)), and because it reflected "automatic and irrevocable foreclosure" by unionized employees from inclusion in benefits without the required element of good faith bargaining. Kezi, Inc., 300 NLRB 594, 595 (1990); Lynn Edwards Corp., 290 NLRB 202, 204 (1988); Handleman Co., 283 NLRB 451 (1987).

Accordingly, we authorized issuance of a Section 8(a)(1),(3) and (5) complaint.

UNION RESTRAINT OR COERCION

Removal of Union Dissidents From Union Property

One issue we considered during this period was whether a Union violated Section 8(b)(1)(A) by causing the removal of dissident members from its property.

There had long been opposing factions in a Local Union which, in February 1993, was placed under trusteeship by the International. In July 1994, the International reorganized the Local into four newly-formed locals and created a District Council to include them and two other locals. A dissident group of members began meeting in October to oppose the International's actions, and filed a lawsuit contesting the trusteeship in November.

On December 15, at a membership meeting attended by a dissident member, it was announced that over $2 million of the Local's liquid assets were being turned over to the District Council. On December 16, the dissident announced that anyone in the Union hall upset about this and interested in taking action should give the dissidents their names and addresses so he could inform them about the next dissident group meeting. He and other dissidents collected names on a pad of paper at one of the tables in the hall.

After a few hours, a District Council official told one of the dissidents that the Union would not allow them to sit there and talk against its conduct, and an International representative stated that he would call the police if names continued to be collected. This threat was reiterated several times that day when other dissident members returned to collect signatures. Later, the dissident left under protest after police officers arrived, conferred with the District Council and International officials, and stated that he would be arrested if he didn't leave.

During a children's Christmas party at the hall on December 17, two dissidents sat at a table inside the door to the hall and collected signatures. Union officials ordered them to leave before the police were called. When the police arrived and the dissidents explained what they were doing, one of the officers said he saw no problem as long as they did not start a fight or create a disturbance.

On January 21, the members of the Union Executive Board and delegates from the District Council's constituent locals met at the Union hall. Dissidents passed out their newsletter in the parking lot to those attending the meeting. The dissidents tried unsuccessfully to attend the meeting, which Union officials stated was an "executive session." A business agent then went outside, informed the dissidents that they were trespassing because it was a non-business day, and that the police would be called if they refused to leave the premises. After the police arrived, the business agent read the trespass warning and the dissidents left.

There were no rules limiting members' access to the Union hall. Moreover, someone had sold Super Bowl T-shirts at the hall, discount coupon books had been sold, and political candidates for public office had distributed fliers there. Additionally, members occasionally sold handmade or school fund-raiser items at the hall.

We decided that the Union violated Section 8(b)(1)(A) by threatening members with arrest, and calling the police, because they were engaged in dissident activities at the Union hall.

The LMRDA, 29 U.S.C. 411(a)(2), confers upon union members the right to participate freely in the internal affairs of a union, including the right to distribute dissident literature critical of the union's operations. The failure to permit distribution of dissident literature on union property, under certain circumstances, has been

found to violate the LMRDA. See Morrissey v. Wall, 96 LRRM 2809 (S.D.N.Y. 1977), where the court declared a no-distribution rule invalid because there was no evidence that a member's disruption of a hiring hall was related to the distribution of literature and where police were never called. Further, Section 7 protection has been extended to the exercise of these rights. Thus, in Carpenters Local 22 (Graziano Construction), 195 NLRB 1, 2 (1972), the Board found that the imposition of a $75 fine against members for fully and freely participating in internal union affairs impaired an overriding policy of the Federal labor laws, set forth in the LMRDA, and constituted restraint and coercion within the meaning of Section 8(b)(1)(A). See also Teamsters Local 597 (Janesville Auto Transport), 310 NLRB 975 (1993); Machinists Local 707 (United Technologies), 276 NLRB 985 (1985), enfd. 817 F.2d 235 (2d Cir. 1987).

However, the right to engage in dissident or other activities protesting a union's actions is not unlimited. Thus, where a dissident engages in otherwise protected conduct but acts in a disorderly or disruptive manner, such conduct is unprotected, and subject to discipline by a union. See New York City Taxi Drivers (Taxi Maintenance Corp.), 231 NLRB 965, 966-67 (1977); Teamsters Local 87 (Harry Shain), 273 NLRB 1838 (1985) (union lawfully fined and disciplined employee who became involved in an altercation with the office manager following discovery of the inadvertent omission of his name from an unofficial work dispatch list). In this regard, the proviso to Section 8(b)(1)(A) permits a union to assure order on its premises, consistent with the limitations set forth in Scofield v. NLRB, 394 U.S. 423, 430 (1969), i.e., an internal union rule will fall within the purview of the proviso to Section 8(b)(1)(A) if the rule "reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and they are reasonably enforced against union members who are free to leave the union to escape the rule." In this regard, we note that after our decision in this case, the Board has held unlawful the mere adoption and maintenance of a no-solicitation/no-distribution rule on union property which was solely aimed at stifling a dissident's exercise of LMRDA rights. See Laborers Local 324 (AGC of California), 318 NLRB No. 66 (August 25, 1995).

Here, the coercive removal of the dissidents on the three days in question restrained them in the exercise of their Section 7 and LMRDA rights to distribute literature critical of the Union leadership and, under the foregoing principles, constituted an unfair labor practice because it was not based on a legitimate union interest. Thus, on

December 16, the dissident activity occurred in the Union hall when the facility was open for members to conduct business and there was no evidence that it was disrupting Union functions. It was undisputed that there are no rules limiting members' access to the Union hall. Moreover, there was evidence of disparate treatment in that the Union had allowed access to its hall for non-Union related business during regular business hours. Therefore, the Union's sole interest in requiring the dissidents to leave was the stifling of protected intra-union activity, and therefore was not legitimate under Scofield.

Similarly, the Union had no legitimate interest in removing the dissidents during the children's Christmas party on December 17. Although the hall was not open for normal business, the Union conducted a function there for all members and their families. Again, the Union sought to stifle only protected intra-union activity which was low-key and did not disrupt the party. Finally, although the Union hall itself was not open to any members other than those entitled to attend the Executive Board meeting on January 21, the dissidents had been distributing their intra-union literature in the parking lot without being disruptive and without interference prior to the meeting. They were not removed from the premises because they attempted to attend the meeting, but rather because they wished to remain in the parking lot after the meeting began. However, since the dissidents desired to handbill or otherwise appeal to Executive Board members who would leave the Union hall when the meeting ended and were not being disruptive, the Union had no legitimate interest in causing their removal from the parking lot. Accordingly, the Union violated Section 8(b)(1)(A) by acting to remove the dissidents from Union property.

Coercive Threats Made By Automated Telephone Service

Our next reported case involved a union's responsibility for unauthorized statements made over its automated telephone answering and direction system.

The Union was party to a collective bargaining agreement with industry employers which provided for preference in employment based on industry experience. There was evidence that in the past, the Union had sought to have employers hire a certain number of Union members before any nonunion employees could be hired. However, pursuant to a prior unfair labor practice charge, the Union had entered

an informal settlement agreement in early 1993 agreeing not to seek preferential hiring for its members.

In late 1994 a representative of an employer who was staffing a job told a group of nonunion applicants who regularly worked in the industry that he could not hire any of them until he had hired a certain number of Union members. The nonunion group protested that the representative was misreading the contract but the individual insisted that his position was correct. (The employer involved subsequently entered an informal adjustment of this apparent violation.)

The Charging Party herein, one of the nonunion applicants, telephoned the Union for confirmation of the employer's assertions. An automated answering system stated, inter alia, "for information and claims involving [preferential hiring] press two." The individual answering at "two" identified himself, and in response to Charging Party's questions, stated that the employer had been correct in stating that a certain number of Union members had to be hired before any non-members could be hired.

The Union denied responsibility for the individual's statements. It maintained that the individual was a temporary employee and not an officer or duly authorized agent of the Union, that the statement was false, and that the individual had no authority to make such statements in carrying out his assigned duties.

We concluded that the individual's statements to the effect that the contract contained unlawful hiring preferences were violative of Section 8(b)(1)(A) of the Act in that they amounted to threats of loss of employment opportunities for non-members. We further concluded that the individual was an agent of the Union at the time he made such statements because the Union had placed him in a position in which he had the apparent authority to answer questions concerning preferential hiring.

The Board applies the common law doctrine of apparent authority in determining a principal's responsibility for the acts of a purported agent. In Southern Bag Corp., 315 NLRB 725 (1994), which involved the apparent authority of a non-supervisory leadman to make statements binding upon his employer, the Board stated: "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question." The test is whether, under all the

circumstances, the third party would reasonably believe that the alleged agent was reflecting the policy and speaking in behalf of the principal. As stated in Section 2(13) of the Act, in determining the issue of agency, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Thus, in Diehl Equipment Co., 297 NLRB 504 (1989), where an individual handed out and received back application forms from job applicants and examined the forms for completeness, the individual was held to have been placed in a position where she had apparent authority to provide information about such applications; thus the individual's statement that the employer did not hire union help was held binding upon the employer. Placing an employee in a position where he answers phone calls directed to him is analogous to placing an employee behind a desk where he hands out application forms. Just as the employee behind the desk had the apparent authority to answer questions concerning the forms, the individual in the instant case had the apparent authority to answer questions concerning preferential hiring.

Further, there have been a number of Board decisions in which persons answering telephone calls have been found to have apparent authority. For example, in Communication Workers Local 6012 (Southwestern Bell), 275 NLRB 1499, 1502 (1985), individuals who answered phone calls to the union's listed phone number, simply responding "union hall" or "CWA", before responding to questions, were deemed clothed with apparent authority to answer questions concerning resignation from the union. And in Plasterers Local 90 (Southern Illinois Builders), 236 NLRB 329, 331 (1978), where the union business agent maintained an office and regularly-listed union telephone line in his home which employees called in order to be placed on the out-of work list and the agent's wife answered the phone giving the union's name, the wife was held to have apparent authority to deal with persons seeking placement on the list.

In the instant case, consistent with the above cases, the Union's placing the individual in a position to answer telephone inquiries from the public on behalf of the Union's preferential hiring services department provided a reasonable basis for third parties to believe that the Union had authorized the individual to answer questions concerning preferential hiring rules and practices. Indeed, a finding of apparent authority was deemed especially warranted in cases involving automated telephone call answering and direction systems. The use of such a system creates a

belief on the part of persons making calls that they are being directed to individuals specifically authorized to answer questions concerning the specific subject identified by the automated system. Here, the Charging Party's telephone call was directed by the automated system to the preferential hiring services desk, and the individual taking the call answered questions concerning that subject.

In the circumstances therefore, we authorized issuance of a Section 8(b)(1)(A) and (2) complaint.

Invoking Interest Arbitration After Withdrawal of Recognition

In another interesting case, we considered whether the Union violated Sections 8(b)(1)(A) or (B) by invoking a contractual interest arbitration provision after the Employer had lawfully withdrawn recognition.

On March 11, 1991, based on a card check, the Employer voluntarily recognized the Union as the exclusive bargaining representative of all its employees performing electrical work. On the same date, the Employer authorized a state Chapter of NECA, a multiemployer association, to bargain on its behalf and entered into two collective-bargaining agreements which expired by their terms on August 31, 1994. One of the contracts provided that either party may submit unresolved bargaining issues to an interest arbitration panel for resolution prior to the anniversary date of the contract.

On March 14, 1994, the Employer gave the Union timely notice of its withdrawal of bargaining authority from NECA and its intention to terminate both collective-bargaining agreements upon their expiration. The Union subsequently notified the Employer of its desire to renegotiate both agreements and submitted proposals, but no bargaining occurred.

On June 7, the Employer received a petition signed by a majority of unit employees providing that they no longer wished to be represented by the Union. Accordingly, the Employer advised the Union that it no longer believed that the Union represented a majority of its employees. The Employer also filed an election petition with the Board. The Union stated that the Employer was bound to the current collective-bargaining agreements and also requested bargaining for new contracts. The Employer rejected the Union's request and the Union filed a Section 8(a)(5)

charge. On July 29, the Regional Director dismissed the charge because the Employer's refusal to bargain was based upon a good-faith doubt of the Union's majority status. On August 5, the Regional Director also dismissed the Employer's election petition because the question concerning representation was now moot.

On August 1, the Union unilaterally invoked the contractual interest arbitration clause and submitted the outstanding bargaining dispute to the Council on Industrial Relations. On August 16, the Council directed the parties to sign and immediately implement the 1994 Agreement between NECA and the Union. On August 31, the prior contracts expired, but the Employer did not sign the 1994 Agreement. The Union demanded from the Employer benefit fund contributions allegedly due under that contract.

We decided to issue both a Section 8(b)(1)(A) and (B) complaint in order to place before the Board the novel questions raised here.

In Electrical Workers IBEW Local 113 (Collier Electric), 296 NLRB 1095 (1989), the Board held that the Section 9(a) representative did not violate Section 8(b)(1)(B) and (3) by unilaterally submitting a dispute to interest arbitration after the employer withdrew from multi-employer bargaining, but did not withdraw recognition. Under the framework set forth in Collier, the Board first considers whether there is a reasonable basis in fact and law for the union's resort to interest arbitration and, if the contract "at least arguably binds the employer to the arbitration provision, the union will be free to seek enforcement of its contractual rights by submitting the unresolved bargaining issues to interest arbitration...." 296 NLRB at 1098.

In Sheet Metal Workers Local 20 (Baylor Heating), 301 NLRB 258 (1991), the Board dismissed a Section 8(b)(1)(B) complaint alleging that the union unlawfully submitted a bargaining dispute to interest arbitration and sought judicial enforcement of the resulting award. The employer had adopted a Section 8(f) pre-hire agreement identical to one negotiated by a multiemployer association. As the contract neared expiration, the employer refused to negotiate a successor agreement and the union filed a Section 8(a)(5) charge against the employer. That charge was dismissed based on the employer's privilege under John Deklewa & Sons, 282 NLRB 1375 (1987), to repudiate the Section 8(f) relationship upon expiration of the agreement. After the contract expired the employer withdrew recognition

from the union. The union then referred the bargaining dispute to an interest arbitrator pursuant to the expired contract.

The Board applied the Collier framework to hold that the union had not violated Section 8(b)(1)(B) because the expired contract at least arguably bound the employer to interest arbitration. The Board noted that an interest arbitration provision "contemplates" a renewal of the agreement, and that nothing in Deklewa prohibits parties from voluntarily agreeing to extend the Section 8(f) relationship. Thus, the Board concluded that, "[i]n these circumstances, it may be argued that the parties have agreed to extend their voluntary contractual relationship beyond the expiration date and that the Deklewa privilege to repudiate had not yet been triggered at the time of the [interest arbitration] submission." 301 NLRB at 260. See also Sheet Metal Workers Local 162 (Dwight Lang's Enterprises), 314 NLRB 923 (1994).

Here, unlike Collier, the Union lost its Section 9(a) representative status when a majority of employees signed a petition repudiating the Union. In Abbey Medical/Abbey Rents, 264 NLRB 969 (1982), enf'd 709 F.2d 1514 (9th Cir. 1983), and Burger Pits, 273 NLRB 1001 (1984), aff'd 785 F.2d 796 (9th Cir. 1986), the Board held that an employer which entertains a good-faith doubt of a union's Section 9(a) majority status is privileged to announce during the term of a contract its intention not to bargain with the union for a new agreement. An employer which declares such an "anticipatory withdrawal of recognition" is obligated only to continue to recognize the union and administer the old contract until its expiration date. Abbey Medical, 264 NLRB at 969; Burger Pits, 273 NLRB at 1001, 1002 n.16.

Under Burger Pits and Abbey Medical, and in contrast to Baylor Heating, the Employer's privilege to repudiate any obligation to execute or negotiate a successor contract was in fact triggered by the Union's actual loss of majority status, as confirmed by the dismissal of the Section 8(a)(5) charge. Therefore, unlike the Section 8(f) relationship in Baylor, it was unreasonable for the Union subsequently to have invoked interest arbitration based on an argument that the interest arbitration clause implicitly extended the parties' relationship, which was based upon Section 9(a). This is so because a Section 9(a) representative's status ceases, by operation of the statute, upon its loss of majority status. An interest arbitration clause has no bearing on Section 9(a) majority standing. Its only relevance as to a withdrawal of recognition is to a Section

8(f) relationship where, because no majority is necessary, it is not unreasonable for a union to argue that it does not violate Section 8(b)(1)(B) because the employer voluntarily agreed to extend recognition through the interest arbitration clause.

Accordingly, we decided that Collier, where the union enjoyed a valid Section 9(a) relationship, and Baylor, where a Section 8(f) relationship existed, were inapplicable to our case where there was no relationship. We therefore decided that the Union violated Section 8(b)(1)(B) by invoking the interest arbitration clause.

After addressing the Section 8(b)(1)(B) allegation under Collier and Baylor, we then considered the Section 8(b)(1)(A) allegation. The Section 8(b)(1)(A) allegation was not, and indeed could not have been, involved in those cases since the union had majority standing in Collier and did not need it in the Section 8(f) case of Baylor.

Without question, the Union's attempt to enforce the contract obtained through interest arbitration, after it lost majority status, constituted a basic violation of Section 8(b)(1)(A). Indeed, if the Employer had agreed to implement the contract, it would have violated Section 8(a)(2). It is axiomatic that a union violates Section 8(b)(1)(A) by obtaining and maintaining recognition, and/or forcing a contract upon employees, if the union does not enjoy majority support among unit employees. See International Ladies' Garment Workers Union (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731, 738-39 (1961); Northland Hub, Inc., 304 NLRB 665, 677-78 (1991); Haddon House Food Products, 269 NLRB 338, 340 (1984), enf'd 764 F.2d 182 (3rd Cir. 1985). Here, the Union filed for and obtained an interest arbitration contract binding the employees to a new contract after it had lost its Section 9(a) status and no longer represented them. In our view, this was a classic violation of the employees' Section 7 rights. Moreover, under the Board's contract bar rules, the interest arbitration award imposing recognition and a new contract, if not attacked through the unfair labor practice route, effectively would bar unit employees from attempting to decertify a minority union during the three-year term of the new agreement.

In sum, the Employer was obligated only to abide by the contract until its expiration (which it did) and it lawfully refused to bargain over a successor agreement. See Burger Pits and Abbey Medical, supra. Notwithstanding the lawful withdrawal of recognition, the Union invoked interest

arbitration and obtained a contract saddling the employees with a new agreement. We concluded that by so doing, the Union violated Section 8(b)(1)(B) by coercing the Employer in its right to bargain through representatives of its own choosing, and Section 8(b)(1)(A) by attempting to force a contract upon employees it does not represent.

We found no merit to the Union's contention that finding a violation in the instant case would necessarily place Section 9(a) unions in a weaker position than Section 8(f) unions, which can enforce a contractual interest arbitration clause without regard to their majority status unless they actually lose a Board election. Thus, unlike the protections afforded a Section 9(a) representative under the Board's contract bar rules, a decertification petition may lie at any time during the term of a Section 8(f) agreement. If a Section 8(f) union loses a mid-term election, the contract is immediately voided and the Section 8(f) relationship terminated. Sheet Metal Workers Local 162 (Dwight Lang's Enterprises), 314 NLRB at 928 n.19. In comparison, should a Section 9(a) representative lose its majority status during the term of a contract, as here, that union retains its right to enforce contractual clauses. In exchange for the relative stability of a Section 9(a) relationship, a Section 9(a) union must retain its majority status, or regain that status through a Board election. Thus, if an employer recognizes a minority union as the exclusive representative of unit employees, the parties risk violations of Sections 8(a)(2) and 8(b)(1)(A).

However, if the Union had sought a Section 8(f), rather than a 9(a), contract before the interest arbitrator, the above analysis was, in part, inapplicable because an election petition may lie during the term of a Section 8(f) contract. Deklewa, 282 NLRB at 1385. Nevertheless, complaint allegations were still viable because the Union's conduct in seeking interest arbitration remained violative of the Act.

A Section 8(f) relationship is the product of a voluntary agreement; a Section 9(a) relationship does not convert into a Section 8(f) relationship absent agreement by the parties. Here, the Union lost its Section 9(a) status and the Employer did not voluntarily recognize the Union under Section 8(f). Thus, the parties had no bargaining relationship cognizable under the Act after the prior Agreement had expired, and there was no statutory basis to support the position that an interest arbitrator may involuntarily impose Section 8(f) recognition on an unwilling party. Moreover, the Board has held in other

contexts that Section 8(f) is no defense to a Section 8(a)(2) allegation that an employer established, maintained or assisted a union by extending recognition. Cf. Barney Wilkerson Construction Company, 145 NLRB 704 (1963).

Further, it was not clear that the expired contract could reasonably have been interpreted as creating a Section 8(f) relationship. The parties' bargaining relationship was established in 1991, when the Employer extended voluntary recognition of the Union under Section 9(a). The Employer did not extend recognition under Section 8(f) during the relevant time period. The interest arbitration clause neither was a recognition agreement -- under any section of the Act -- nor did it define the nature of the parties' relationship under the new contract. Rather, the interest arbitration clause merely provided that either party may submit a bargaining dispute to binding arbitration. Accordingly, once the parties' bargaining relationship ended when the Union lost majority status and the Employer withdrew recognition, resort to the interest arbitration clause -- regardless of the Union's claim that it now is a Section 8(f) representative -- had no reasonable basis in law or fact.

After we decided to issue complaint in order to place before the Board the above arguable violations governed by neither Collier nor Baylor, we also decided to place before the Board the alternative view, i.e., that the Union had not violated the Act because it had not unreasonably claimed that the Employer had contractually agreed to extend its relationship with the Union.

Thus, the interest arbitration clause did not address whether the new contract would be governed under Section 8(f) or 9(a). Rather, it appeared that the prior Agreement was applicable to NECA contractors which had Section 8(f) as well as 9(a) relationships. This is lawful because NECA member-employers, like the Employer herein, were construction industry employers which lawfully may enter into minority contracts under Section 8(f). Accordingly, it was not unreasonable for the Union to have argued that in the construction industry, the contractual interest arbitration clause was intended to continue the parties' contractual relationship under either Section 8(f) or 9(a). Under this view, the Board could distinguish both Collier Electric and Baylor Heating as unresponsive to the issue herein, viz., whether the Union had an arguable basis for contending that the interest arbitration clause of the expired agreement envisioned a continuation of the current contractual relationship, regardless of whether a signatory

union retained its status, under either Section 8(f) or 9(a), throughout the term of the expired agreement.

UNION DUTY OF FAIR REPRESENTATION

Various Issues Arising Under CWA v. Beck

In our next reported case, we considered a case containing the following issues under CWA v. Beck, 487 U.S. 735 (1988): whether the Union unlawfully (1) refused to consider the Charging Party's challenge to the Union's representational fee because the challenge was made outside the established window period for such challenges; (2) failed to escrow funds in dispute from the date of the Charging Party's challenge; (3) relied upon a "local presumption" that it spent more on representational activities than the International Union; and/or (4) charged objecting non-members for nonrepresentational expenditures.

First, we decided that the Union unlawfully failed to consider the Charging Party's timely challenge to its fee allocation, and unlawfully failed to escrow the disputed fee amount immediately upon challenge. A union must provide new non-members with a separate opportunity to lodge a Beck objection if they resign outside a window period. See Beck Guidelines, GC Memorandum 88-14, at 3. This opportunity would be meaningless if the non-members did not also have a separate opportunity to challenge the disclosure outside the window period. Without such an opportunity, new non-members who objected outside the window period would be remediless in their first objecting year for any deficiencies contained in the initial financial disclosure. Here, the Union not only denied the new non-member a separate opportunity to challenge the disclosure outside the window period, it also withheld any response to the new non-member's Beck objection until five months later. In our view, such conduct violated Section 8(b)(1)(A).

Second, under the Beck Guidelines, when an objector challenges a union's fee calculation, the union must place the amount in dispute into an interest-bearing escrow account while the matter is being resolved. Beck Guidelines at 5. Since the Charging Party challenged the fee allocation, the Union also violated Section 8(b)(1)(A) by failing to escrow disputed amounts from that date forward.

Third, the Union unlawfully relied upon an unsubstantiated local presumption in establishing the fee

chargeable to objecting non-members. For the purpose of satisfying the disclosure requirements imposed under Beck, a union can rely upon a "local presumption," i.e., a presumption that a local union spends no greater percentage on nonchargeable matters than does the international, if there is some basis provided by the union validating this presumption. In the past, we have argued that the use of a factually unsupported local presumption does not conform to Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986) and the requirement that the union provide potential objectors with "sufficient information to gauge the propriety of the union's fee" (i.e., a breakdown between chargeable and nonchargeable expenditures). In other words, a union may rely upon a local presumption only after its validity has been established through proof of actual expenditures in a baseline year or years.

The precise information required for validation of the local presumption will vary from local to local. A union could provide a verified listing of the actual expenditures of the local or some other data, e.g., a balance sheet, demonstrating that the local expends a higher proportion of its total expenditures for chargeable purposes than does the entity to which the local's expenditures are being compared, perhaps in combination with a narrative statement explaining why it is reasonable to believe that the international or other organization to which the local is being compared will in fact spend more for non-chargeable purposes than the local. Once a union has established the validity of the presumption in a baseline year, in succeeding years the union could provide historical information setting forth the international's expenditures in the preceding year and the expenditures of both the local and the international or other compared entity for the baseline year, together with evidence demonstrating the pattern reflected in the figures for the baseline year is unchanged.

Applying these principles, we decided that the Union had not yet established the validity of its local presumption, because it had not established its actual expenditures in a baseline year. Thus, objecting non-members did not have information sufficient to gauge the propriety of the Union's fee. Accordingly, the Union's failure to provide any information regarding its own expenditures violated Section 8(b)(1)(A) of the Act.

However, despite the Union's improper use of a local presumption, we decided that the Union was justified in collecting clearly representational expenses from the Charging Party. In previous cases, we have argued that if a

union has no procedures in place for complying with Beck, it cannot lawfully collect any moneys from non-member objectors. In such cases, the remedy sought was that the union not only establish Beck procedures, but also pay back all moneys, for chargeable as well as nonchargeable expenses, which were collected from objecting non-members prior to instituting such procedures. However, where a union had some Beck procedures in place, and its response to objectors constituted a good-faith attempt to provide other necessary disclosures and dues adjustment, we have argued that the union did not forfeit its right to collect clearly representational dues from objectors.

Finally, we decided that the Union unlawfully charged objecting non-members for nonchargeable expenditures. We noted that the Union relied on the International's audited disclosure in establishing the fee chargeable to objecting non-members. The International's disclosure (even in the absence of a local presumption) established the chargeability of that portion of dues the Union forwarded to the International, and did include as chargeable some expenditures that were not chargeable. Discussed below, however, are some of the Charging Party's specific objections to chargeability in the International's disclosure which we found without merit.

The International claimed as chargeable to each objecting non-member, regardless of his bargaining unit, expenditures made on behalf of all bargaining units with which the International was affiliated. Since we already were currently litigating the "unit-by-unit" issue in other cases before the Board, we therefore decided to withhold this allegation from this and other new complaints where the Region is able to secure the appropriate procedural waiver from the union.

The International's disclosure statement listed as fully chargeable all "out-of-work" benefits. The Charging Party contended that even strike benefits paid to employees in the Charging Party's unit were nonchargeable because non-members were not eligible to receive such benefits. It appeared that the basis of this contention was that as a non-member he would never strike.

We rejected this contention. In Ellis, 116 LRRM at 2008, the Court noted that the social activities found chargeable there were "formally open to non-member employees." After finding that the question of the chargeability of the union's death benefits was moot, the Court also noted that, had the benefits not been available

to non-members, their expense could not have been charged to objectors. 116 LRRM at 2010, n. 14. However, we noted that social activities and union-provided death benefits are only tangential to a union's representational function, i.e., they only indirectly affect its representational activities by enhancing its cohesiveness as an organization. It therefore is reasonable to require that non-members be permitted to participate in such activities if they are going to be charged for them. On the other hand, the ability to wage an effective strike, which depends on the ability to provide financial support to strikers, often is essential to successful collective bargaining. Therefore, we decided to argue that expenditures on strike benefits were directly related to the union's function as collective-bargaining representative. In our view, even though the non-members would not strike, they were legitimately charged with supporting this activity to the extent it involved their bargaining unit.

We also decided to reject the Charging Party's contention that educational programs listed as fully chargeable on the International's disclosure were nonchargeable because they were not available to non-members. Training of Union officers and Union employees in collective-bargaining, grievance adjustment or other representational activities is essential to the Union's effective performance as a Section 9(a) representative. Therefore, we concluded that such costs were chargeable to the extent they were incurred in the Charging Party's bargaining unit, even though non-members could not themselves participate in such training.

The International's disclosure listed as fully chargeable pension payments made on behalf of officers and employees of affiliated unions. Contrary to the Charging Party's contention, we decided that such payments on behalf of the officers and employees of the Union or the International representing the Charging Party's bargaining unit were chargeable. We noted that rank and file employees, including non-members, did not participate in the plan. However, we viewed this kind of payment as part of the compensation package for employees of the Union and the International, and not as a benefit available to only member, but not non-member, employees. However, as a part of officer compensation, these payments should have been pro-rated in accordance with the amount of time each of the officers/employees covered spent on representational activities that year. The Union's failure to pro-rate in that regard violated its obligations under Beck.

The International's disclosure statement listed as fully chargeable all financial assistance to its affiliates. As discussed, supra, this was insufficient because it failed to break down expenditures on a unit-by-unit basis and resulted in the charging of objectors for extra-unit expenditures. With regard to financial assistance to the Charging Party's bargaining unit, such expenditures need not have been divided, by the International, according to representational and nonrepresentational functions because the Union itself accounted for the way in which it spent such funds.

The International's disclosure statement listed as fully chargeable its expenses of providing audit and other services to local affiliates. Apart from charging objectors for extra-unit expenditures, the International failed to pro-rate these expenditures according to the representational/nonrepresentational expenses of the local union.

The International's disclosure statement listed internal administration expenses as fully chargeable. This category covered administrative costs related to the maintenance of membership and dues status information, and other financial record-keeping. It also includes some overhead expenses, specifically occupancy (building) expenses and salaries, that are not for nonchargeable activities. We decided that the accounting functions should have been pro-rated according to whether they were related to representational or nonrepresentational activities. With regard to the overhead and salary expenses, it appeared that the International included only those expenses that were related to chargeable activities.

The International's disclosure statement listed "organizing" as 100 percent chargeable. We decided to issue complaint in order to place before the Board the issue of whether a union may lawfully charge objecting non-members for expenditures made on organizing activities. We also decided to provide the Administrative Law Judge with both sides of the argument on this difficult issue. Therefore we argued not only the basis for finding a violation, but also the view of the General Counsel that these expenditures should be considered chargeable.

UNION REFUSAL TO BARGAIN

Union Grievance Seeking Accretion

In another case we considered the question whether a Union had violated its bargaining obligation under Section 8(b)(3) of the act by pursuing a grievance concerning the alleged accretion of a group of employees who previously had been excluded from the represented unit pursuant to a unit clarification petition.

The Union was bargaining representative of a unit of office technical employees at one of the Employer's plants. In 1991, the Employer transferred a group of unrepresented clerical employees to this facility and the Union claimed that the employees belonged in its unit. The Employer filed a unit clarification (U/C) petition which ultimately resulted in the Regional Director finding that the unrepresented group were not an accretion to the bargaining unit.

In 1993 the Employer announced a corporate restructuring which involved various changes in the job duties and work assignments of represented as well as unrepresented employees. Subsequently, the Union filed a contractual grievance maintaining that the unrepresented clericals had become an accretion to its unit as a consequence of the restructuring and therefore were covered by its collective bargaining agreement. The Union primarily relied upon a contract clause which, in substance, provided that in the event the Employer established a new or changed job by combining significant amounts of bargaining unit work with duties not normally performed by unit employees, the resulting job will be considered to be within the unit. The contract further provided that any differences which arose as to whether any individual employee is or is not included in the unit will be handled as a complaint or grievance.

Upon exhaustion of the grievance process the Union demanded arbitration and the Employer sought to block the arbitration by filing the instant charge. The Regional Director dismissed the charge and the Employer filed an appeal. The Employer also filed a new unit clarification petition which was still pending before the Regional Director at the time the instant appeal was decided.

While questions of representation are the exclusive province of and must ultimately be decided by the Board, parties are not precluded from resorting to arbitration to resolve such issues, particularly where the representation

question has not been previously decided by the Board. See, Stage Employees IATSE Local 695 (Vidtronics Co.), 269 NLRB 133 (1984). However, the Board has consistently held that a union violates Section 8(b)(3) when it seeks to arbitrate a representation issue after that issue has been decided by the Board. E.g., Smith Steel Workers (A.O. Smith Corp.), 174 NLRB 235 (1969), enfd. in part sub nom. Smith Steel Workers v. A.O. Smith Corp., 420 F.2d 1 (7th Cir. 1969); Teamsters Local 952 (Pepsi Cola Bottling), 305 NLRB 268 (1991). Further, in Retail Clerks Local 588 (Raley's), 224 NLRB 1638 (1976), enf. den., 565 F.2d 769 (D.C. Cir. 1977), the Board rejected the contention that this rule should not be applied where there have been changed circumstances since the Board's representation decision and the Board has not examined such changes or otherwise ruled on the continued appropriateness of its unit determination. In doing so, the Board declared (p. 1640):

> The Union's insistence on application of the terms of its contract to the drug center employees amounted to adamant insistence that Raley's bargain for a unit which the Board previously found inappropriate. It is irrelevant that the Board's unit finding had been prior to a change of circumstances. As in virtually every case of alleged unfair labor practices, the Respondent acts at its peril: if, upon subsequent litigation before this Board, its position that the drug center employees have accreted to the unit which it represents were found to be correct, then no violation will be found. but if it be found that the drug center unit maintained its identity and continued to be separately appropriate, the Respondent Union's insistence upon recognition as the representative of employees in that unit contravenes the mandate of Section 8(b)(3) of the Act. (Citations omitted.)

It appeared in the subject case that the Union, in good faith, presented at least a colorable claim of accretion in light of changed circumstances. However, the Board had recently excluded the employees in question from the unit and the Union therefore would have been better advised to file a U/C petition rather than demand arbitration of the issue. Issuance of complaint therefore was warranted consistent with Raley's supra. Thus, in the circumstances of this case, should the Union not prevail on the accretion issue, it arguably violated Section 8(b)(3) by pursuing the grievance. [Further, should the arbitrator issue an award finding an accretion, any attempt by the Union to enforce that award would also violate 8(b)(3) whether or not a prior U/C determination had issued, provided no accretion had actually occurred. Honeywell, Inc., 307 NLRB 278 (1992).]

Inasmuch as the Employer's U/C petition remained pending in the Region at the time we considered the appeal, we decided to authorize the Region to issue an 8(b)(3) complaint and hold it in abeyance pending final disposition of the U/C petition. If no accretion is found, the Region would go forward with the complaint. If accretion is found, the complaint would be withdrawn.

Unilateral Insertion of Union "Foreword" In Printed Bargaining Agreement

In another interesting case, we considered a union's unilateral insertion of its own "Foreword" in the parties' final printed collective bargaining agreement.

The parties had agreed upon a new contract and, pursuant to their long-standing practice, the Employer prepared the final draft, and the Union had the agreement printed, with the Employer paying half the costs. Without the prior knowledge or consent of the Employer, the Union had its own "Foreword", signed only by Union officials, inserted as the very first page of the contract and numbered "1". The next page was the unnumbered "Table of Contents," while the third page, also numbered "1", was the "Foreward" [sic] which had been agreed upon and signed by both parties consistent with their past practice.

In substance, the Union's foreword warned employees not to take their rights, benefits or working conditions for granted, reminded them that the Union had fought for everything the contract had achieved, and encouraged them to ensure that the contract was always enforced. It directed employees to contact their shop steward "at any time" and advised that the Union's professional staff was available to deal with their job problems, even though the contract prohibited employees and stewards from handling such problems during working hours except in limited circumstances.

We concluded that the Union's insertion of its own "Foreword" in the final printed contract, without the knowledge or consent of the Employer, constituted a unilateral addition to the negotiated terms of the collective bargaining agreement violative of Section 8(b)(3) and 8(d) of the Act. The Union's "Foreword", heightened by its prominence on the opening page, falsely implied that the foreword had been agreed upon as part of the contract and embodied the mutual intent of the parties. Indeed, because

it was physically incorporated into the printed contract and bore the misleading page number one, it created the distinct impression that it was an integral part of the agreement the Union had reached with the Employer. The fact that, unlike the true, negotiated "Foreward", the Union's foreword was not signed by the Employer, did not alter the fact that it purported to be part of the negotiated contract. While a union may well be entitled to create its own foreword as a separate document or side-letter to be distributed to its members separately from the printed contract, in our view a union acts unlawfully when it adds its own gloss to the agreed-upon contract in the manner herein.

Here, the Union's "Foreword" substantially altered substantive terms as well as the tone and tenor of the negotiated agreement. Thus, the allusion to the accessibility of the Union's stewards and professional staff apparently modified provisions of the contract which placed limitations on the performance of shop steward duties. A reference to the Union as one which "had to fight for everything it has achieved on behalf of employees" suggested a confrontational relationship with the Employer which was directly contrary to the approach set forth in the agreed-upon foreward, wherein both parties made a commitment to seek "the best possible relationship" and acknowledged that "timely communication . . . generally results in quick and amicable settlement." Similarly, a reference to the Union's "success at the bargaining table" suggested a recognition of the Union's strength with which the Employer apparently was not in full agreement or at least did not care to endorse as part of the contract.

The Union's insertion of its own foreword therefore had the potential to vitally affect significant aspects of the employment relationship. It infused the entire agreement with a shade of meaning never contemplated by the Employer and sought to add an interpretative gloss which constituted a unilateral modification that could not be ignored as de minimis. In this respect, the instant case was deemed analogous to the "union bug" at issue in Electrical Workers IBEW Local 1464 (Kansas City Power), 275 NLRB 1504 (1985), where the employer's failure to include the union's logo in the printed agreement, as had been agreed to in negotiations, precluded the employer from being able to compel the union, under Section 8(b)(3) and 8(d), to sign such agreement. It was concluded there that the union should not be forced to forfeit what it had negotiated. By parity of reasoning, the Union here should not be permitted to add something to the contract that it had not negotiated.

We therefore authorized issuance of a Section 8(b)(3) and 8(d) complaint.

SECONDARY BOYCOTTS

Consumer Boycott Picketing On Neutral Employer's Premises

In our next reported case, we considered the legality of picketing which sought a consumer boycott of a primary employer doing business on the secondary's premises.

The Union represented the employees of Employer A, which operated cafeterias in the headquarters building of a large corporation (Employer B). The Union and Employer A were unable to reach agreement on the terms of a new contract and the employees struck. In anticipation of picketing, Employer B established a reserved gate system, clearly designating a particular gate for the exclusive use of Employer A, its employees and suppliers, and directing all others to the remaining gates. However, the Union picketed at all of the gates, with signs soliciting a boycott of Employer A's cafeterias.

Employer B thereupon filed the subject Section 8(b)(4)(i) and (ii)(B) charge, alleging, in substance, that the Union's picketing at other than the gate reserved for Employer A was for the unlawful object of bringing secondary pressure on Employer B. In this respect, Employer B maintained that the Union could not lawfully engage in consumer picketing at B's premises since Employer A is a nonretail establishment and thus not amenable to consumer picketing. Employer B argued that, to hold otherwise would mean that picketing of a provider of services at a neutral employer's premises could be justified as "product" picketing so long as the neutral secondary or its employees utilized the primary's services.

We rejected this contention and found that the Union's picketing was lawful. In NLRB v. Fruit & Vegetable Packers (Tree Fruits), 377 U.S. 58 (1964), the Supreme Court held that peaceful secondary picketing of retail stores with the expressed limited intention of inducing a consumer boycott of products sold through such stores was not prohibited by the secondary boycott provisions of Section 8(b)(4). In that case union members picketed a retail grocery store that sold apples produced by the primary employer. The pickets did not ask consumers to withhold patronage from the neutral

grocery, but only to refrain from buying the primary employer's apples.

The cases decided since Tree Fruits provided no support for the proposition that nonretail establishments and/or providers of services are, or should be, treated differently from a provider of goods. For example, in General Services, Local No. 73 (Andy Frain, Inc.), 239 NLRB 295 (1978), where the union picketed airline companies in its dispute with the primary employer Frain, who supplied baggage handlers to the airlines, the union's contention that its picketing was privileged by Tree Fruits was rejected, but not for the reason that a supplier of services could not be the subject of Tree Fruits consumer picketing. Rather, the Board held that the picketing was unlawful because, instead of attempting a product boycott, the union sought a total boycott of the airlines by requesting customers not to do business with airlines utilizing the primary's baggage handlers.

Moreover, this case does not fall within the prohibition enunciated in NLRB v. Retail Store Employees (Safeco), 447 U.S. 607 (1979), of consumer picketing which has the inevitable consequence of causing a boycott of a neutral employer. Thus, in Safeco, the Union could not lawfully engage in consumer picketing urging the customers of a title insurance company not to purchase Safeco's insurance policies, since Safeco's policies were the principal product sold by the title company and the union's appeal therefore was calculated to induce customers not to do business with the title company at all. Similarly, under the "merged product" doctrine, a union could not engage in consumer picketing of the primary employer's bread where the bread was served as part of meals in the secondary employers' restaurants and could not be distinguished by the customer as the primary employer's bread. Thus, a consumer seeking to honor the boycott would have no option other than to boycott the restaurants altogether. The Board held that in such circumstances the picketing was in reality an effort to induce customers not to eat in the restaurants in order to force the restaurants to cease buying the primary's bread. Teamsters Local 327 (American Bread Co.), 170 NLRB 91 (1968), enfd. 411 F.2d 147 (6th Cir. 1969). See also, K & K Construction Co., Inc. v. NLRB, 592 F.2d 1228, 1231-1234 3rd Cir. (1979), reversing 233 NLRB 718 (1977); Honolulu Typographical Union No. 37 (Hawaii Press Newspapers, Inc.), 167 NLRB 1030 (1967), enfd. 401 F.2d 952, 954-955 (D. C. Cir. 1968).

In the present case, the was no evidence that the Union sought to enmesh Employer B in its dispute with Employer A or to cause a boycott of Employer B or its products. The Union's picket signs clearly stated that the Union's dispute was with Employer A and asked that employees and visitors not eat at A's cafeterias. Employer B itself did not offer cafeteria services but only made such services available through Employer A as a convenience to its employees and customers. Thus, consumers could readily boycott Employer A without affecting their business relationship with Employer B.

We accordingly concluded that the Union had engaged in lawful consumer picketing and declined to authorize issuance of complaint.

Union Statement to Primary As Threat Against Neutral

In our last reported case, we considered a union's statement to a primary employer that the union would use economic pressure against a secondary employer in furtherance of the union's dispute with the primary employer.

The Employer had been party to an exclusive hiring agreement for many years which obligated it to obtain craft employees from the local union within whose jurisdiction the work was being done. In the past, the Employer had experienced problems with the instant Local Union which dispute was resolved by an agreement that the Employer would deal directly with the District Council when working in the Local's jurisdiction.

In October 1994 the Employer was retained by a general contractor to perform certain work within the Local's jurisdiction. Before the job began, the Local's business agent informed the Employer that the Local wanted its people on the job. The Employer responded that he had already hired employees and referred to the agreement of a few years earlier. The Local's business agent replied that if the Employer undertook the job without using the Local's men, the Local, which represented the general contractor's employees, would pull its men off the general contractor's other jobs. The dispute ultimately was settled by the Employer agreeing to hire a limited number of men through the Local.

We concluded that the Local business agent's statement to the Employer constituted a threat to use economic pressure against the neutral general contractor and therefore violated Section 8(b)(4)(ii)(B) of the Act, despite the fact that the general contractor himself had not been threatened.

Section 8(b)(4)(ii)(B) prohibits threats made to "any person engaged in commerce . . ." and is not, on its face, limited to threats made directly to the neutral secondary employer. Thus, similar threats not made in the presence of or directly to the neutral employer were found unlawful in The Wackenhut Corp., 287 NLRB 374, 382 (1987), as well as in Tri-State building Trades Council (Blackman Sheet Metal), 272 NLRB 8, fn. 1 (1984), and Iron Workers Local 40 (Spancrete Northeast), 249 NLRB 917, 920 fn. 12 (1980).

Accordingly, we authorized issuance of an appropriate Section 8(b)(4) complaint.

Section 10(j) Authorizations

During the first nine months of 1995, the Board authorized a total of 75 Section 10(j) injunction proceedings. Most of the cases fell within factual patterns set forth in General Counsel Memoranda 89-4, 84-7 and 79-77. As contemplated by those memoranda, these cases are described in the chart set forth below. For a fuller description of the case categories, the reader is directed to General Counsel Memoranda 89-4, 84-7 and 79-77.[1]

One case was somewhat unusual and therefore warrants special discussion.

The parties were engaged in collective bargaining for their first labor agreements following the Union's certification in three separate bargaining unit locations. The parties reached agreement on a number of issues. However, the parties reached impasse on two Employer proposals. In the first, the Employer proposed retaining unilateral power to make all decisions during the life of the agreement concerning the compensation of one employee classification which constituted a significant portion of the bargaining units. In the second, the Employer proposed it would have the power during the agreement to make unilateral changes in certain corporate-wide benefits which the unit employees would enjoy. The Region had issued a Section 8(a)(5) complaint alleging that the Employer's insistence to impasse upon these two proposals, which retained for the Employer substantial control over the unit employees' wages and benefits during the life of the labor agreement, was a failure to bargain in good faith.

We decided that interim relief under Section 10(j) was needed to protect the parties' collective bargaining process. We concluded that the Employer's ongoing bad faith bargaining threatened irreparable injury to the Union's employee support, which was considered vulnerable given the Union's recent certifications and the fact that this was bargaining for an initial labor agreement. In balancing the harms to the parties and considering the public interest, we decided that interim relief to enjoin the Employer's unlawful bargaining posture was just and proper.

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[1] See also NLRB Section 10(j) Manual, Appendix A, "Training Monograph No. 7."

The district court granted the requested injunction and extended it to cover all three locations in which the parties were involved in negotiations.

The 75 authorized cases fell within the following categories, as defined and described in General Counsel Memoranda 89-4, 84-7 and 79-77:

Category	Number of Cases in Category	Results
1. Interference with organizational campaign (no majority)	21	Won seven cases; four cases settled before petition; nine cases settled after petition; one case was not filed based upon changed circumstances.
2. Interference with organizational campaign (majority)	14	Won three cases; three cases settled before petition; three cases settled after petition; lost one case; one case withdrawn based on changed circumstances; three cases are pending.
3. Subcontracting or other change to avoid bargaining obligation	1	Won case.

Category	Number of Cases in Category	Results
4. Withdrawal of recognition from incumbent	13	Won five cases; two cases settled before petition; one case settled after petition; one case withdrawn based on changed circumstances; one case not litigated based on changed circumstances; lost two cases; one case is pending.
5. Undermining of bargaining representative	10	Won six cases; two cases settled before petition; lost one case; one case is pending.
6. Minority union recognition	1	Case is pending.
7. Successor refusal to recognize and bargain	5	Won two cases; one case settled before petition; one case settled after petition; one case is pending
8. Conduct during bargaining negotiations	7	Won four cases; two cases settled before petition; one case is pending.
9. Mass picketing and violence	2	Won one case; lost one case.
10. Notice requirements for strikes and picketing (8(d) and 8(g))	0	- - - - -

Category	Number of Cases in Category	Results
11. Refusal to permit protected activity on property	0	- - - - -
12. Union coercion to achieve unlawful purpose	0	- - - - -
13. Interference with access to Board processes	0	- - - - -
14. Segregating Assets	1	Won case.
15. Miscellaneous	0	- - - - -